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A question of law of more than usual difficulty has recently arisen at *nisi prius* in two of the States, Missouri and Texas, which calls for more than passing notice. The point of real legal difficulty in both these cases were identical and succinctly stated, is as follows: Where the beneficiary and the insured in a policy of life insurance perish in a common disaster, so that it is beyond human possibility to determine which of them died first, do the proceeds of the policy belong to the heirs of the beneficiary or to the heirs of the insured? One of the cases referred to was that of *United States Casualty Co. v. Kacer*, decided recently in the Circuit Court of the city of St. Louis, and the other, that of *Care v. The Brotherhood of Locomotive Firemen*, decided by the District Court of the city of Galveston. The two courts reached exactly opposite conclusions. In the former case Mr. Yocum, the insured, had taken his daughter, Florence, the beneficiary of her father, upon a cruise on the Gulf of Mexico in a private yacht. In a storm off Bird's Island near New Orleans, the yacht capsized and all on board perished. The policy was payable to "Florence Yocum if surviving." Upon interpleader between the heirs of the beneficiary, Florence Yocum, and the personal representative of her father, the court decided that since the beneficiary under a policy of life insurance acquired a vested interest to the fund named in the policy at the time it is issued, the words "if surviving" were a condition subsequent, and the burden of proving that the beneficiary did not survive rested on the personal representatives of the insured, and no such proof being possible, the proceeds of the policy went to the heirs of the beneficiary, which in this case were distant relatives of the girl on her mother's side, about as far away from the intention of the insured as could be imagined. In the Texas case a policy held by one Thomas Kelly was made payable in the event of his death to his wife, Maggie Kelly. Both Kelly and his wife perished in the Galveston storm of September 8, 1900. Two half-brothers of the wife, Maggie Kelly,

brought suit for the proceeds of the policy, which were also claimed by Mr. Kelly's sisters. The court held that the proceeds of the policy should go to the sisters of the insured, to be divided equally between them.

In the construction of wills and the distribution of the estates of decedents, the rule as to survivorship in a common disaster has been settled by a long line of decisions both in this country and in England, and is well stated and thoroughly discussed in the case of *Newell v. Nichols*, 75 N. Y. 78. It may be summarized as follows: There are no presumptions in law of survivorship in case of persons who perish by a common disaster, but one who claims through a survivorship must prove the survivorship. In the absence of other evidence the fact is assumed to be unascertainable, and the property rights are disposed of as if death occurred at the same time, not because of a presumption of simultaneous death, but because there is no evidence or presumption to the contrary. In applying this rule to the distribution of the proceeds of a policy of life insurance, the doctrine of "vested interest" becomes an obstacle of grave importance. We incline, however, to favor the decision of the Texas court and to make no distinction in the rule of survivorship in this regard between regular life policies and the certificates of beneficial associations. As a logical application of the doctrine of vested interest as applicable to regular life policies, no criticism can be found with the decision of the Missouri court, but the inequitable result to which a strict adherence to the doctrine has led the court in this case, shows clearly that it is not the right principle upon which to decide such questions. The father in this case procured the policy for the benefit and protection of his daughter after his death, and for this purpose alone he faithfully kept up the payment of the premiums thereon. It is no stretch of the imagination to say that it certainly was not his intention that this entire fund should under any circumstances become the property of distant relatives of his wife, who had no interest whatever in his life. It is more natural to suppose that in such case he would prefer his own estate or his own relatives as the beneficiaries of the fund. Indeed, the doctrine of vested interest as applicable to contracts of life insurance can-

not be carried out logically and literally,—the word "vested" having a legal significance too great and too extended to properly define the right and interest of the beneficiary. Nothing more can be meant by the use of such words, than that the beneficiary named in the policy has such an interest in the policy that will prevent the insured from interfering in any manner with her right to take under the policy or to demand the proceeds upon the happening of all contingencies and upon compliance with all the conditions contained therein.

We have taken but a general view of this question, but are constrained to believe that courts in their zeal to protect the wife and children have undoubtedly been led into the use of words in defining the interest of such parties as beneficiaries of insurance which do not properly limit their rights under the policy, and which in many cases could not be literally enforced without doing violence to all principles of life insurance and arriving at results that could not be other than inequitable. The great purpose of such contracts in making provision for the protection of those interested in the life of the insured against pecuniary loss by reason of his death in their lifetime should be kept constantly in view, and the assertion of no legal quibbles or technicalities should be permitted to defeat the clear intention of the insured under a reasonable construction of the plain terms of the contract.

#### NOTES OF IMPORTANT DECISIONS.

**LIFE INSURANCE—CONFLICT OF LAWS—RIGHT TO PROCEEDS—CONTRACT.**—In *Millard v. Brayton*, 59 N. E. Rep. 436, decided by the Supreme Judicial Court of Massachusetts, it was held that the rights of beneficiaries under a life policy, which is issued in New York, to be delivered and accepted in Massachusetts, on payment of the premiums, must be settled by the laws of Massachusetts, and not by the laws of New York, though the policy stipulates that the premiums and the sum insured are to be paid in New York; that where a wife's interest in the life of her husband is insured for her benefit, the contract with the company is that of the wife, and not of the husband; and that where a wife insures her interest in the life of her husband for her own benefit if she survives him, otherwise for the benefit of her children, and then dies during his lifetime, leaving children surviving her, who die during his life, the proceeds of the policy go to

the administrator of the children, and not to his estate as a resulting trust.

**CONTRACT TO MAKE A WILL.**—The case of *Steele v. Steele*, 61 S. W. Rep. 815, recently decided by the Supreme Court of Missouri, presents an interesting illustration of what acts or statements of a decedent will be sufficient to raise a presumption of a promise to make a will in favor of a third party. In this case the decedent took plaintiff, then 5 years old, from an orphan asylum, the only condition imposed by the manager being that the boy should have a good home in a Christian family, and reared plaintiff as his son, receiving from him a son's duty, and from time to time decedent made statements indicating that he intended to leave his property to plaintiff at his death, but there was no evidence that he ever contracted to leave his property to plaintiff or bound himself so as to impair his right to will his estate as he might thereafter see fit. It was held that plaintiff, even if adopted, occupied no better position than decedent's own son would have done, and could not recover the estate, as against the testamentary disposition thereof made by decedent. Judge Valliant, speaking for the court, said: "The burden rested on the plaintiff, and it was his duty to present to the chancellor evidence so strong, cogent, and convincing as to remove and exclude every doubt that decedent made the contract."

**JURISDICTION OF FEDERAL COURTS.**—In the recent case of *Louisville Trust Co. v. Stone*, 107 Fed. Rep. 305, it was held that when the jurisdiction of the federal court is invoked on proper grounds, but complainant fails to establish his position on the federal question involved, the bill may be retained to administer relief on other grounds, though the State courts could afford adequate remedy. The court summarized the rule as follows: "If the claim to relief clearly within the federal jurisdiction is fair and colorable, not fictitious and fraudulent, jurisdiction attaches, although the ultimate decision may be against the right claimed. *Penn Mut. Life Ins. Co. v. City of Austin*, 168 U. S. 695, 18 Sup. Ct. Rep. 223, 42 L. Ed. 626. When the jurisdiction has properly attached it extends to the whole case, and to all the issues involved, whether of a federal or non-federal character, and the court has power to decide upon all questions involved. This was the statement of the principle in *Railway Co. v. Taylor (C. C.)*, 86 Fed. Rep. 168, and seems to be amply supported by the authorities. *New Orleans, M. & T. R. Co. v. Mississippi*, 102 U. S. 135, 26 L. Ed. 96; *Horner v. United States*, 143 U. S. 570, 12 Sup. Ct. Rep. 522, 36 L. Ed. 266; *Scott v. Donald*, 165 U. S. 71, 17 Sup. Ct. Rep. 265, 41 L. Ed. 632. The federal jurisdiction having been properly invoked, we may examine into the other questions made in the case, notwithstanding as to them there may be a remedy in the State court."

**CORPORATIONS — CONTRACT WITH STOCKHOLDER—PREFERENCE TO CREDITORS.**—An interesting point of law, involving the right of a corporation to contract with a stockholder that in case of failure the par value of his shares would be a preferred claim against the corporation in preference to all other creditors, is discussed with great ability in the case of *Guaranty Trust Co. v. Railroad*, 107 Fed. Rep. 311. The city of Galveston in granting a franchise to a street railroad of that city received in consideration therefor 600 shares of the capital stock of the corporation, and a further provision in the contract stipulated that, in the event that the company should allow itself to be incumbered with debt, the city should have a prior lien on the company's franchise and property to secure the par value of its stock in preference to any other creditor. The court in holding such a contract void as to creditors, although valid as to other stockholders, uses the following language: "What was the interest of the city which the company undertook to secure? It seems to us clear that it was its interest as a stockholder. When a corporation is dissolved by consolidation with another, or becomes involved in debt and concludes to stop operations and pay its debts, if there are any assets left after paying off the debts they are ordinarily distributed between the stockholders in proportion to the number of shares which each holds. There is no preference of one stockholder over other stockholders, except such preference is expressly contracted for. A preference as to capital stock or a distribution of net assets may be expressly contracted for. Such preferred stockholders, however, are not creditors of the corporation, but are stockholders entitled to a preference over the holders of common stock. *Cook, Stocks & S. § 270*; *Clark, Corp. 367*; *Coulter v. Robertson*, 57 Am. Dec. 168; *Hamlin v. Railroad Co., supra*. We think the interest of the city of Galveston in the Galveston City Railroad Company was one capable of being secured, and that the evident purpose of the company in providing security for that interest was to give the city a preference in the distribution of the capital stock or net assets of the company over other stockholders. It will not be presumed that the purpose of the company was to make a contract by which the city was to receive the par value or any part of its stock before all the debts of the company are paid. It would require the clearest language to show that such was its purpose. But if it existed, the contract would be contrary to public policy and void. *Cook, Stocks & S. §§ 271-278*; *Warren v. King*, 108 U. S. 339, 2 Sup. Ct. Rep. 789, 27 L. Ed. 769; *Hamlin v. Railroad Co., supra*; *Miller v. Ratterman*, 47 Ohio St. 141, 24 N. E. Rep. 496. In *Warren v. King, supra*, the court said: 'One of the characteristics of capital stock is that no part of the property of a corporation shall go to reimburse the principal of capital stock until all the debts of the corporation have been paid.' And

in *Hamlin v. Railroad Co.*, 78 Fed. Rep. 664, the court said: 'There is a wide difference between the relation of a creditor and a stockholder to the corporate property. One cannot well be a creditor as respects creditors proper, and a stockholder by virtue of a certificate evidencing his contribution to the capital of the corporation. Stock is capital, and a stock certificate but evidences that the holder has ventured his means as a part of the capital. It is a fixed characteristic of capital stock that no part of it can be withdrawn for the purpose of reimbursing the principal of the capital stock until the debts of the corporation are paid. \* \* \* If the purpose in providing for these peculiar shares was to arrange matters so that under any circumstances a part of the principal of stock might be withdrawn before the discharge of all corporate debts, the device would be contrary to the nature of capital stock, opposed to public policy, and void as to creditors affected thereby.'"

**EXCESSIVE VERDICT—RIGHT OF TRIAL COURT TO ORDER A REMITTITUR AND DENY A NEW TRIAL.**—In the case of *Chicago Title and Trust Company v. O'Marr*, 64 Pac. Rep. 506, the interesting question of the right of the trial court, when it believes a verdict to be excessive, to give to the successful party the option of remitting a part of the verdict in his favor to the extent of the excess, and on his compliance overruling the motion for a new trial, is very ably and exhaustively discussed. The court holds that in an action for conversion, if the trial court regards the verdict as in excess of the value of the property, it is not error to give the plaintiff the option of remitting the excess, and, if he does so, to order the verdict to stand for the residue, instead of granting a new trial absolutely. The authorities are not all in accord on this question and counsel for appellants very forcibly presented to the court the distinction made by some of the cases holding the right of the trial court to order a remittitur to be applicable only to verdicts for personal injuries and not for injuries to property or property rights. *Milburn, J.*, in a concurring opinion, answers this objection:

"This court having, notably in *Kennon v. Gilmer*, 9 Mont. 108, 22 Pac. Rep. 448, decided that in an action for personal injury a verdict held to be excessive may be reduced without submitting the case to another jury upon a new trial, it seems to me, in reason, unnecessary to discuss the question whether a verdict for damages to property or property rights may be reduced at the option of plaintiff by order of the trial or appellate court. If a verdict for personal injury may be lawfully reduced by the court, why does it not follow, logically and *a fortiori* that the court has the power to reduce a verdict for injury to property or property rights? In the latter case the verdict is based upon testimony of witnesses who testify to values within their knowledge,

and the jurors do not have to grope in the darkness of speculation and conjecture, and the court may be able to definitely discover and point out the exact amount of excess which it intends to subtract from the sum found by the jury. I may say that I cannot see any reason in those decisions which have held that a court may interfere and reduce the verdict in the case of bodily injury and may not do so in the case of injury to property or property rights."

At the close of his opinion, however, Justice Milburn sounds a note of warning to trial courts against an abuse of their discretion in scaling verdicts and denying a new trial: "I wish to here go on record as saying that while in duty bound to bow to the law as it is and has been made by the courts, I am opposed to the tendency of the times to increase the power of the courts, and to permit them to invade those duties which are the sole duties of the jury. \* \* \* The power to grant new trials in law cases because the verdict is excessive means to give the parties another trial before a jury, and not, in the discretion of the court, to diminish the amount of damages given in the verdict. The action of the court in scaling the verdict and then refusing a new trial is too often to close the door to the losing party in the appellate court; for, notwithstanding the fact that in numerous cases the finding of excessive damages indicates passion and prejudice on the part of the jury, still the presumption is in favor of the act of the court, and the use of sound discretion by it; the effect of the law of verdict scaling being that the court below has, by the use of its intellect, discovered how much the mind of each juror was biased, and has, with a thorough knowledge of the laws of metaphysics, applied the remedy by cutting down the verdict. To dictate a compromise by threat of the expense of a new trial is a convenient way to clear the docket, but ought only to be resorted to in special cases, such as above indicated."

**MARRIAGE AND DIVORCE — JURISDICTION.**—What are known as the Divorce Cases, recently decided by the Supreme Court of the United States, and concerning which the newspaper press of the country has made such extended comment, are briefly and excellently epitomized in the latest issue of the *Virginia Law Register*. These cases are *Atherton v. Atherton*, *Bell v. Bell*, and *Streitwolf v. Streitwolf*. The *CENTRAL LAW JOURNAL* will publish the opinion of the court in the case of *Atherton v. Atherton* in its next issue, together with a complete annotation on the jurisdiction of State courts of suits for divorce where defendant is a non-resident and not domiciled within the jurisdiction. The *Register*, speaking editorially, has the following to say concerning these decisions: "The bar will doubtless be interested in the opinion of the Supreme Court of the United States in *Atherton v. Atherton*, published elsewhere in full. It will

be observed that there is nothing novel or revolutionary in the decision as indicated by the press dispatches announcing it. The point decided, in brief, is, that where a divorce is granted to a husband, in the State of his domicile, and of the matrimonial domicile, on constructive service of process, and after reasonable effort to give actual notice to the absent wife, in accordance with the statutes of the State where the suit is brought, a decree of divorce entered in such suit is entitled to full faith and credit, under the United States constitution, in every other State, and is binding on the wife, so far as it declares a matrimonial dereliction on her part and divorces the parties for the cause so found, as effectually as if she had been actually served with process in the home State or had voluntarily appeared. It has long been regarded as settled by an overwhelming preponderance of reason and authority that a divorce granted by the State of the domicile of either consort, on constructive service of process, duly authorized by the *lex fori*, is binding on the absent consort, even without actual notice, provided the service authorized was reasonable—and that a decree so entered is binding in every other State, so far as it ascertains and declares the *status* of the parties, and is not in *personam*. This doctrine had not, however, distinctly received the sanction of the United States Supreme Court until the decision in the principal case. The New York courts have persistently declined to recognize the prevailing doctrine, but the principal case will necessarily give the doctrine a uniform operation throughout the country. Mr. Justice Peckham was loyal enough to his New York training to dissent.

The opinion in the principal case approves the general rule stated, *arguendo*, but the court is careful to confine its decision to the precise case before it—namely, where the suit is brought in the State of the plaintiff's domicile and of the matrimonial domicile, and reasonable steps to serve actual notice on the absent defendant are required by local statute, and the requirements of such statute are carefully observed. The general rule of international law is, that each State has the right to determine the *status* of its own domiciled citizens. And though, as a general principle, the decree has no extraterritorial operation, yet, as the marriage *status* can exist only in pairs, it follows that where a husband is declared by a court of competent jurisdiction, and jurisdiction is rightfully exercised, to be no longer a married man, such a decree *ex necessitate* operates to release the wife from the bonds of the marriage, since there can be no wife without a husband. As aptly illustrated by Mr. Bishop, the matrimonial *status* may be likened to a pair of scissors—if one blade be removed no scissors remain. 1 Bishop, Mar. Div. and Sep. 698-702, 2 *Id.* 133, 137-158.

Two other cases decided by the supreme court on the same day with the *Atherton* case, illustrate the converse of the rule enforced in that case.

These are *Bell v. Bell*, 21 Sup. Ct. Rep. 551, and *Streitwolf v. Streitwolf*, *Id.* 553. In *Bell v. Bell*, it is held that no valid divorce can be entered on constructive service of process by the courts of a State in which neither party has acquired a *bona fide* domicile—and recitals of jurisdictional facts in the record of such suit may be contradicted, in a subsequent suit between the same parties in another State. This decision is likewise carefully confined to the precise question presented, namely, the effect of a decree of divorce where neither party is domiciled in the State where the decree is entered, and where process is constructively served, with no appearance by the defendant. On principle and authority, the effect would have been the same, had there been actual service of process within the State, and actual appearance and defense made—since no State has jurisdiction to determine the status of a married pair, neither of whom is domiciled therein. *People v. Dawell*, 25 Mich. 247, 12 Am. Rep. 260, per Cooley, J.; *Hood v. State*, 56 Ind. 263, 26 Am. Rep. 21; 2 *Bishop*, Mar. Div. & Sep. 41-75. Though in *Re Ellis Estate*, 55 Minn. 401, 43 Am. St. Rep. 514, it is held that neither party who voluntarily submits to the jurisdiction in such case, will be permitted in a collateral civil proceeding to question the validity of such a divorce—voluntary submission to the jurisdiction operating as an estoppel. See further on this point 1 *Bishop*, Mar., Div. & Sep. 1470, 1513, 2 *Id.* 187. The main point decided in *Streitwolf v. Streitwolf*, the third of these cases, was substantially the same as that in *Bell v. Bell*, with a similar ruling, namely, that a divorce granted to a husband in North Dakota, where he had acquired no *bona fide* domicile, is no defense to a divorce suit brought by his wife, and pending against him at that time in New Jersey, both parties being domiciled citizens of New Jersey.

#### DISCHARGES IN BANKRUPTCY FROM PARTNERSHIP DEBTS ON VOLUNTARY INDIVIDUAL PETITIONS.

Applications by individual partners for discharges in bankruptcy from partnership debts, often present for determination difficult and complicated questions on account of the numerous material matters to be considered and the diversified circumstances attendant upon the different cases. The provisions of the bankruptcy laws upon matters concerning partnerships, including the adjudications and discharges of the firm and the members thereof, the methods of procedure therein, the distribution of the assets of the firm and individuals, and the payment of their respective debts; alone fur-

nish abundant grounds for differences in judicial opinions relative thereto. In addition there arise in each case its peculiar features; the number of members of the partnership; their residences; the solvency or insolvency of the firm and of each of its members; the joint and several debts and assets; the dissolution of the firm, if it has occurred, and the time and circumstances thereof; the petition or petitions filed, whether by the firm or by one or more members thereof; and the other pleadings before the court and the proceedings thereunder. Accordingly it is not strange that the decisions are not only at variance but in direct conflict upon the general question, as to whether or not a partner can be discharged from both his individual and partnership debts on his own voluntary individual petition. Under the bankruptcy law of 1867 the question came before Blatchford, district judge, in the succeeding year on an application to amend the voluntary individual petition of one partner, the other partner not joining, which petition gave one schedule of debts, and one inventory of assets, both debts and assets being stated to be individual.<sup>1</sup> The schedule showed that the debts were largely co-partnership debts. The amendment was allowed, the learned justice holding that the petitioner could not be discharged on the original petition from his partnership debts, but that the other partner should be brought in before adjudication; the creditors of the firm required to meet in but one proceeding and all pertinent questions determined in the bankruptcy forum. Ten years later the learned judge saw no reason for changing this opinion, and held,<sup>2</sup> in a case where there were firm assets, that a partner could not be discharged from the firm debts on his individual petition, there being no adjudication against the firm nor against the other partners; that the adjudication of the firm and members must be had in one proceeding and on one petition; that the two petitions could not be consolidated, and consequently the individual member could not in a proceeding by himself alone with no proceeding by or against the firm be dis-

<sup>1</sup> *In re Little* (1868), 1 N. B. R. 341, Fed. Cas. No. 8890, 15 Pitts. Leg. J. 268.

<sup>2</sup> *In re Plumb*, Fed. Cas. No. 11,231, 9 Ben. 279, 17 N. B. R. 76.

charged from the debts he owed as a member of the co-partnership.

The doctrine of these decisions has been maintained by other judges. In a partnership matter, where proceedings were pending in a State court and one of the partners desired adjudication in the bankruptcy forum, Drummond, circuit judge, held<sup>3</sup> that the partner had that right so long as there was any unfinished business on the part of the firm, any debts or credits or assets of any kind, and made the broad statements: "It is difficult to see how any member of a firm can be released from his personal liability as such without the court looking substantially into all the transactions of the firm and settling up its affairs;" and "A man cannot be discharged from his liabilities as a member of a firm unless the debts and assets of the firm are considered and adjudicated upon by the court." And so where a defendant in a suit, brought to recover on a partnership obligation, pleaded his discharge in bankruptcy, and it appeared that he obtained his discharge on his individual petition, and that the firm was not adjudicated bankrupt, nor was there any proceeding by or against the firm, it was held that there had been no discharge of the defendant from his partnership debts.<sup>4</sup>

In contradistinction to the foregoing there is a line of decisions under the law of 1867 maintaining the general doctrine that a partner on his individual voluntary petition can be discharged from both his individual and partnership debts. Justice Field early under that law held that where in the schedule of such a petition were inserted debts contracted by the co-partner-

ship, and there were no partnership assets to be administered, the petitioner would be entitled to be discharged from all his debts, individual and co-partnership, and that it was not necessary that the other partners should be brought in or made parties,<sup>5</sup> and at a later date Justice Lowell held that when a member of a firm obtained his discharge in bankruptcy he was released from liability for his joint as well as his separate debts, and that it was not necessary that the firm should be declared bankrupt in order to vest the individual bankrupt's share of the joint estate in his assignee.<sup>6</sup> The finding is based largely upon English decisions, which are reviewed at length, and its statements are as comprehensive in allowing a discharge from both classes of debts on an individual petition as are those of Justice Drummond in denying a discharge in such cases. Justice Lowell's position is sustained by numerous decisions, and it has even been said to be supported by the weight of authority under the then existing law.<sup>7</sup>

It is impossible to harmonize the decisions rendered previous to the enactment of the present law on the subject under discussion. The judges avowedly differed from one another on distinct propositions involved, and in different jurisdictions there were different rules of practice relative to petitions, schedules and procedure in cases of this kind. About the only satisfactory result of these judicial determinations, as a whole, was that authorities could be found to support almost any proceeding, accomplished or proposed, in this class of bankruptcy applications.

Definite and explicit provisions are contained in the bankruptcy law of 1898 with regard to partnership matters, and some of these provisions modify or enlarge those of the former law. In section 5 it is provided, among other things, that a partnership may be adjudged a bankrupt "during the continuance of the partnership business or after its dissolution and before the final settlement thereof;" that the court of bankruptcy

<sup>3</sup> *In re Noonan* (1873), 10 N. B. R. 330, 3 Biss. 491, Fed. Cas. No. 10,292, 5 Chic. Leg. News, 557.

<sup>4</sup> *Hudgins v. Lane*, 11 N. B. R. 462, Fed. Cas. No. 6827. See also in this connection *Corey v. Perry*, 67 Mo. 140, 17 N. B. R. 150; *Crompton v. Conkling*, 15 N. B. R. 417; *In re Winkins*, 2 N. B. R. 113 (quarto), Fed. Cas. No. 17,875; *Sigsby v. Willis*, 3 N. B. R. 51 (quarto); *In re Jewett*, 16 N. B. R. 48; *Amsink v. Bean*, 22 Wall. 395, 11 N. B. R. 495; *In re Grady*, 3 N. B. R. 227; *In re Crockett*, 2 N. B. R. 75; *Trindle v. Moore*, 47 N. Y. Super. Ct. 340; *Lindsey v. Corkery*, 29 Gratt. 650; *Perkins v. Fisher*, 80 Ky. 11; *Gleim v. Arnold*, 56 Cal. 631; *In re Hathorn*, Fed. Cas. No. 6214; *In re Gorman*, Fed. Cas. No. 5624, Biss. 23, 18 N. B. R. 419; *In re Johnson*, 17 Fed. Rep. 72; *In re Shepard*, Fed. Cas. No. 12,754, 3 N. B. R. 172; *Brandenburg on Bank* (2d Ed.), pp. 96, 122; *Collier on Bank* (3d Ed.), pp. 60, 62.

<sup>5</sup> *In re Abbe*, 2 N. B. R. 26 (quarto).

<sup>6</sup> *Wilkins v. Davis* (1876), 15 N. B. R. 60.

<sup>7</sup> *In re Webb*, Fed. Cas. No. 17,317, 16 N. B. R. 258, 10 Chic. Leg. News, 27; *In re Brick*, 4 Fed. Rep. 806; *In re Stevens*, 5 N. B. R. 112; *In re Bidwell*, 2 N. B. R. 78 (quarto); *In re Frear*, 1 N. B. R. 201; *Mattix v. Leach* (Ind. App. Ct.), 43 N. E. Rep. 989.

which has jurisdiction of one of the partners may have jurisdiction of all the partners, and of the administration of the partnership and individual property; that the proceeds of the two classes of property shall be equitably appropriated to the payment of the two classes of debts; and that in the event of one or more, but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt, but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit and account for the interest of the partner or partners adjudged bankrupt. Rule 8, general orders, which relates to a petition by a member to have a partnership adjudicated bankrupt, requires that the firm and any member or members who object to the adjudication be brought into court with the petitioner. Form No. 2, which is a "partnership petition," makes provisions for the scheduling of partnership debts and assets and individual debts and assets in separate schedules.

The above review, while necessarily brief and incomplete, is sufficient to show the general character and effect of the requirements of the present law relative to partnerships. It is the evident intention to allow a partnership to be brought into the bankruptcy court at any time before settlement and to provide for all its affairs being settled in one proceeding. Partnerships are not divided as under the former law into those in business and those not in business, but into those whose affairs are settled and those whose affairs are not settled, and partners who belong to firms of the latter class cannot be discharged from partnership debts until the firm's affairs are settled. As a matter of course and of right these provisions have been carefully considered in the decisions rendered since the new law went into effect, but uniformity has not yet been attained in the judicial findings on the questions under discussion. The separate voluntary petitions of the partners comprising a firm came twice before Brown, district judge, and he held, at the first hearing, that the partnership not being in bankruptcy the petitioners were not entitled to discharges affecting the partner-

ship debts. He said: "The petitions ask a discharge from individual and from co-partnership debts. No individual debts are stated; all the debts in each petition are stated to be firm debts only. No adjudication of the firm as a bankrupt is asked, nor could such an adjudication be made without a formal application therefor, and the presence of both partners in the same proceeding. Where there are absolutely no firm assets, separate proceedings may be valid, and a discharge of each partner separately may possibly be had, because the firm debts are several as well as joint. But where there are firm assets they must be duly administered in bankruptcy in a single proceeding, and the right to a discharge is an incident to that single proceeding and to the administration of all the assets, whether firm or individual, according to the provisions of the law in such cases."<sup>8</sup>

At the second hearing, after disposing of a technical point, the learned judge reaffirms the previous ruling of the court, that in order to secure a discharge from firm debts there must be an adjudication of the firm as bankrupt and a firm trustee appointed, where there are firm assets, and further holds that where a firm has been adjudged bankrupt on the voluntary petition of a partner, either partner without reference to the others may present his individual petition for a separate discharge; but a petition seeking such a discharge should recite the adjudication of the firm and of the petitioner as a member of it and should pray for a discharge from both firm and individual debts, and the notice to creditors should advise them of the same facts.<sup>9</sup>

Three cases in which findings were made pertinent to the subject under discussion were before Shiras, district judge, in 1899, and he held<sup>10</sup> that where on a voluntary petition one member of a partnership sought a discharge from both individual and firm debts, the creditors of the firm could prove debts against the bankrupt and cause his interest in the firm property to be subjected to the payment thereof, and under proper pleadings, notices and proceedings, the discharge

<sup>8</sup> *In re Meyers*, 96 Fed. Rep. 408.

<sup>9</sup> *In re Meyers*, 97 Fed. Rep. 757.

<sup>10</sup> *In re Laughlin*, 96 Fed. Rep. 589; *In re Hartman*, *Id.* 593; *In re McFann*, *Id.* 592.

granted would release the petitioner from both classes of debts. The reasoning of Judge Shiras, so far as it can be briefly stated, is: The last clause of section 5 of the Act of 1898 shows that although all the partners may not be adjudicated bankrupt in a given case, and do not become subject to the jurisdiction of the court unless by the consent of all the partners, yet the partners not adjudicated bankrupt are required to account for the interest of the bankrupt partner in the firm business; the object of this is to prevent a partner who objects to the firm's being adjudged bankrupt from making it impossible for another partner to get a discharge; it is not the intent of the act that firm creditors should be enabled to reach and subject to the payment of their claims the bankrupt's interest in the firm property, but that the bankrupt cannot obtain a discharge against the firm debts because the firm was not adjudged bankrupt. The learned judge asserts in strong terms that proper foundations must be laid for a discharge of a partner in such a case from both individual and firm debts; that the petition should set forth the names of the partners and pray a discharge from partnership debts; the schedule should list both the petitioner's individual property and debts and the property and debts of the firm; the notices to creditors should inform them that firm creditors are affected, and that the bankrupt seeks a discharge from their debts, and notices of the filing of the petition and of creditors' meetings should be sent to non-joining partners. If these requirements are not observed it is held the discharge will be effective only as to individual debts. In no one of the three cases was the record sufficient to justify a discharge from both classes of debts.

On a voluntary petition by certain partners, the others not joining and not having been notified, an adjudication that the petitioners, "as co-partners and as individuals," be declared bankrupt, has been held erroneous, and it was further held that the defect as to notice was not cured by filing in court after adjudication a paper purporting to embody the consent of the non-joining partners, which is unverified, qualified in its terms and signed only by their attorneys.<sup>11</sup>

<sup>11</sup> *In re Altman*, 95 Fed. Rep. 263.

One conclusion which as has been held is properly drawn from the foregoing is, that it is the policy of the act of 1898 to treat partnerships as distinct legal entities,<sup>12</sup> and accordingly in a bankruptcy proceeding affecting a partnership it must be before the court as such, and if the proceedings contemplate the adjudication of the partnership or any of its members the affairs of the firm must be properly and fully administered. It is certainly a proper conclusion, also, that the act contemplates the administration of the affairs of any partnership of which there has not been a final settlement; that is, so long as there exists a right in any party to sue for a settlement of partnership affairs, or to enforce an executory agreement of settlement, or to obtain reimbursement for moneys paid upon a partnership debt, or so long as there remains an unadministered partnership asset, or so long as there remains a partnership debt which is enforceable against any partner anywhere within the territorial jurisdiction of the United States.<sup>13</sup> Another point on which there appears to be no dispute is, that in the event a partner desires a discharge from both his individual and firm debts and files his individual petition therefor, the petition, the schedules, the notices and all pleadings and proceedings must be in strict conformity with the requirements of the law relative to bringing in or notifying all necessary parties, and presenting to the court all pertinent matters concerning both individual and firm affairs.

Whether or not there were firm assets is a consideration that has led to variances in judicial opinions, as has been indicated above. There have been opinions rendered which made it proper for an individual partner to petition for his discharge without reference to the firm or the other partners in the event of there being no firm assets.<sup>14</sup> However fairly such a rule might operate in many instances, it is submitted that it is too broad to be equitable without exception. A partnership may have no assets and yet not be finally settled. There may be debts, or the very question as to

<sup>12</sup> *Strause v. Hooper*, 105 Fed. Rep. 590.

<sup>13</sup> *In re Levy*, 95 Fed. Rep. 812, 2 Am. Bank. Rep. 21.

<sup>14</sup> *In re Hirsch*, 97 Fed. Rep. 571, 3 Am. Bank. Rep. 344.

whether or not there are social assets may be in dispute. It certainly is necessary to ascertain in each particular case the facts relative to a settlement, if there has been one, and if it does not clearly appear that it has been final then the partnership and its affairs should be administered in court. Without this the petitioner would run the risk of obtaining a discharge which could not be successfully pleaded in a suit to recover from him a partnership debt. It certainly is a great risk to proceed on the assumption that there are no firm assets, and even if there are none, the existence of firm debts or of assets belonging to members of the firm, in the opinion of the writer, makes it necessary to have the firm properly before the court in order to insure to a partner a discharge from both firm and individual debts. The question of firm assets should not be made conclusive in cases of the kind under discussion.

Another relevant question upon which there has been disagreement or, rather, another form of the preceding question regarding firm assets, is: Can a partner be discharged from firm debts before the firm has been adjudicated bankrupt? As appears above, it has been held that an unqualified affirmative answer would be too broad, for the reason that in some instances, especially where there are no firm assets, a partner can be properly discharged from firm debts without such an adjudication of the firm. In the opinion of the writer, however, this position is not correct, and there can be no hardship or injustice in a general enforcement of the rule, that an adjudication of the firm is necessarily preliminary to the discharge of a partner from firm debts. A partnership is either bankrupt or it is not. If its adjudication as bankrupt is successfully resisted by any interested party, it follows, as a matter of course, that there are no firm debts. In such a case a partner has no need of a discharge from partnership debts. When a solvent partnership's matters are finally settled there will be no partnership debts, but there will have been a complete adjustment and accounting of firm matters, and the only debts arising from the partnership are individual debts due from one partner to another. In case a partnership is bankrupt, it certainly should be so adjudged and have its

affairs administered, as a condition precedent to the discharge of any individual members from firm debts. A different rule would lead to complications that would result unjustly and to the prejudice of the partners not seeking discharges in bankruptcy.

In view of the diversity in the judicial opinions pertaining to the subject of this article, it may be proper to add in conclusion, statements which would usually be trite and pedantic: Great care should be exercised by attorneys for individual bankrupts, who seek discharges from both individual and firm debts, in the preparation of the petitions and notices and other pleadings and in the entire procedures. In case the partnership's affairs have not been finally and definitely settled, it should be brought before the court in its legal capacity and a complete settlement of its matters effected before the discharge. Should there be any doubt concerning the settlement it would certainly be preferable to unnecessarily bring in the partnership rather than to disregard it entirely, and finally ascertain that the discharge on the individual petition was not effective as to partnership debts.

Chicago.

CYRUS J. WOOD.

#### INTOXICATING LIQUORS — CIVIL DAMAGE ACT—LOSS OF SUPPORT.

##### HOMIRE v. HALFMAN.

*Supreme Court of Indiana, April 18, 1901.*

Under Act March 17, 1875, §§ 15, 20, making it a misdemeanor to give or sell liquor to an intoxicated person, and authorizing an action against a person unlawfully selling or furnishing liquors by any person injured thereby, a saloon keeper who sells liquors to an intoxicated person, by which the latter becomes so crazed that he commits a homicide, and is sent to the penitentiary therefor, is liable to an action for loss of support by the wife of the intoxicated person.

DOWLING, C. J.: Action for damages alleged to have been sustained by appellant by reason of having been deprived of her means of support by the wrongful act of the appellee. The complaint was in a single paragraph, to which a demurrer was sustained for want of facts. Judgment for appellee followed. The error assigned presents the question of the sufficiency of the complaint, the material allegations of which were as follows: That on August 8, 1892, the plaintiff was married to Fred Homire, and has ever since been, and now is, his legal wife; that as such wife she was dependent upon her said husband for her support and maintenance prior to and until June

8, 1898; that on June 8, 1898, the defendant, John H. Halfman, who was then and there engaged in selling, bartering, and giving away intoxicating liquors in the city of Lebanon, Ind., and engaged in what is commonly known as the "saloon business," did then and there wrongfully and unlawfully sell to, give away to, barter, and furnish to the plaintiff's said husband a quantity of intoxicating liquor, plaintiff's said husband being then and there in a state of intoxication, as the said defendant then and there knew at the time when he furnished such liquor to the said Fred Homire; that said intoxicating liquor so sold, given away, bartered, and furnished to the said Fred Homire by the said defendant was drunk by the said Homire, said plaintiff's husband, from the effects of which he became so extremely intoxicated as to be irritable, crazed, and frenzied; that while in such irritable, crazed, and frenzied condition plaintiff's said husband went from defendant's place of business in said city to the home in said city where plaintiff's said husband, together with this plaintiff and one Seth Nease, then and there resided; that upon arriving at said home in such irritable, frenzied, and crazed condition, plaintiff's husband procured a revolver pistol, loaded with gunpowder and leaden balls, and did then and there, while in such irritable, frenzied, and crazed condition, so caused by defendant's wrongful and unlawful sale and furnishing of said intoxicating liquors to the said Fred Homire, wrongfully, purposely, unlawfully, and feloniously shoot and discharge said revolver pistol at and against the body of the said Seth Nease, then and there and thereby inflicting upon the person of the said Seth Nease a mortal wound, from which mortal wound, caused as aforesaid, the said Seth Nease then and there died; that afterwards, on said day, the plaintiff's husband was arrested by the officers of the law, charged with said killing, and confined in the county jail of Boone county, Ind.; that afterwards, on the — day of June, the said Fred Homire was indicted by the grand jury of the Boone circuit court of Boone county, Ind., at the April term, 1898, thereof, charged with murder in the first degree in the killing of said Seth Nease; that on the — day of June, 1898, the said Fred Homire entered upon his trial on said indictment in the Boone circuit court; that afterwards, on the — day of July, 1898, the jury in said cause returned a verdict into open court finding the said Fred Homire guilty of murder in the first degree, and assessing his punishment at imprisonment in the State's prison during the term of his natural life; that afterwards, on July 5, 1898, the said Boone circuit court rendered judgment upon said verdict, and adjudged that the said Fred Homire be confined in the State's prison of Indiana during the term of his natural life; that on the — day of July, 1898, the said Fred Homire, in pursuance of said judgment, was removed by the sheriff of Boone county from the jail of that county to the State's prison in the

county of Laporte, there to remain during the term of his natural life; that by reason of such confinement of the said Fred Homire, the plaintiff's said husband, the plaintiff has not been since June 8, 1898, is not now, and will never again be, able to be supported and maintained by her said husband; that on said June 8, 1898, the said Fred Homire was of sound body and mind, and was 52 years of age; that by reason of the matters stated the plaintiff has been greatly and permanently injured in her means of support to her damage \$20,000; that said injuries were caused by and resulted from the defendant's wrongful act in selling, etc., intoxicating liquors to the plaintiff's husband while in a state of intoxication.

The action is founded upon section 20 of "An act to regulate and license the sale of spirituous, vinous and malt and other intoxicating liquors," etc., approved March 17, 1875, which is as follows: "Every person who shall sell, barter or give away any intoxicating liquor in violation of any of the provisions of this act, shall be personally liable, and also liable on his bond filed in the auditor's office, as required by section 4 of this act, to any person who shall sustain any injury or damage to his person or property, or means of support, on account of the use of such intoxicating liquors, so sold as aforesaid, to be enforced by appropriate action in any court of competent jurisdiction." Burns' Rev. St. 1894, § 7288; Rev. St. 1881, § 5323. Section 15 of said act of 1875 is in these words: "Any person who shall sell, barter, or give away any spirituous, vinous or malt liquors to any person at the time in a state of intoxication, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than ten or more than fifty dollars." It was held by this court in *Mulcahey v. Givins*, 115 Ind. 286, 288, 17 N. E. Rep. 598, that section 20 is "to be construed as if it read: 'Every person who shall barter or give away any spirituous, vinous or malt liquors to any person at the time in a state of intoxication shall be personally liable and also liable on his bond \* \* \* to any person who shall sustain any injury or damage to his person or property, or means of support, on account of the use of such intoxicating liquors.' As thus construed, the right to prosecute a civil action under that section for the sale of alcoholic liquors to a person in a state of intoxication was neither abridged nor taken away by the subsequent enactment of section 2092, above set out." Upon the question before us the case of *Beers v. Walhizer*, 43 Hun, 254, is directly in point. The averments of the complaint in that case were substantially the same as in the one at bar. The court there said: "The only argument presented by the defendant in support of the ruling at the circuit is upon the facts as stated in the complaint." It is said that "It does not appear that the loss of means of support sustained by the plaintiff was the direct result of the intoxication; that the arrest, trial, and conviction of the plaintiff's husband by the

officers of the law, and which resulted in his imprisonment, was the cause that produced that result, and was wholly independent of the intoxication produced by the liquor sold by the defendant, George, and for that reason no cause of action was alleged against them within the provisions of the said act. The homicide committed by Beers was a crime punishable by imprisonment, and his arrest, conviction, and sentence was a result to be anticipated, and, as a matter of course, by the force and operation of the law of the land. The conviction of Beers was not the cause of his imprisonment, but was the result of the crime which he perpetrated in killing Banfield, and that act was the direct and only cause in the eye of the law for the incarceration. Under the act it is necessary that two facts should occur besides the sale or gift of the liquor by the defendant to constitute a cause of action, to-wit, intoxication resulting from its use in whole or in part, and the loss of the means of support by the plaintiff in consequence of such intoxication. The statute requires nothing more. The act itself establishes a rule of evidence applicable to and controlling in all cases arising under its provisions, which in some respects is new, and has produced a radical change in the common-law rule. The statute makes no distinction whether the loss of the means of support is the direct or remote result of the intoxication. 'It only requires that it should be established that the loss of the means of support is the result of such intoxication. The decisions are all in one direction on this subject, and the meaning and effect of the statute in this respect is settled by the frequent interpretation which has been placed upon its provisions. In *Bertholf v. O'Reilly*, 74 N. Y. 509, Andrews, J., in delivering the opinion of the court, said the legislature 'may change the rule of common law, which looks only to the proximate cause of the mischief, in attaching the legal responsibility, and allow a recovery to be had against those whose acts contributed, although remotely, to produce it. This is what the legislature had done in the act of 1873.' In *Volens v. Owen*, 74 N. Y. 529, the same learned judge remarked that both direct and consequential injuries are plainly included in the remedy given, and the legislature, by giving a right of action for injury to means of support, created a cause of action unknown to the common law. In *Meade v. Stratton*, 87 N. Y. 493, it was held that the statute provides for a recovery by action for injuries to person or property, or means of support, without any restrictions whatever, and that both direct and consequential injuries were included; that it is evident that the legislature intended to go, in such a case, far beyond anything known to the common law, and to provide a remedy for injuries occasioned by one who was instrumental in producing or who caused such intoxication. In the recent case of *Neu v. McKechnie*, 95 N. Y. 632, a like interpretation was given to the statute, and applied to the case then

under consideration." The decision in *Beers v. Walhizer*, *supra*, was followed in *McCarthy v. Wells*, 51 Hun. 171, 4 N. Y. Supp. 672, and *Bacon v. Jacobs*, 63 Hun. 51, 17 N. Y. Supp. 323. It was decided in *McCarthy v. Wells* (Sup.), 4 N. Y. Supp. 673: "The question was not whether the death of the deceased was the natural, reasonable, or probable consequence of the defendant's act, but it was enough if intoxication, caused in whole or in part by liquor sold by the defendant, was the cause of the death of the plaintiff's husband, if by reason thereof the plaintiff's means of support were injuriously affected." The rule is laid down in many cases that an action may be maintained under similar statutes for loss of means of support, it matters not from what direction it comes. If the means of support is lessened, and it can be traced to the sale of intoxicants, there is a right of recovery for such loss; as in the case of lessened ability to labor, and loss of attention to business. *Wightman v. Devere*, 33 Wis. 570; *Hutchinson v. Hubbard*, 21 Neb. 33, 31 N. W. Rep. 245; *Volans v. Owen*, 74 N. Y. 526, 30 Am. Rep. 337; *Schneider v. Hosier*, 21 Ohio St. 98. So where sickness or insanity is the result of the intoxication (*Mulford v. Clewell*, *Id.* 191), and where expenses are incurred for care and medical attention (*Wightman v. Devere*, 33 Wis. 570); and, where the husband was robbed while intoxicated, the wife was allowed to sue (*Franklin v. Schermerhorn*, 8 Hun. 112); and so where the husband spent his wife's money for drink (*McEvoy v. Humphrey*, 77 Ill. 388); and the mother was allowed to recover for injuries where the son overdrove her horse on account of drink. *Bertholf v. O'Reilly*, 8 Hun. 16. The mere spending by the husband of his own money, it has been said, will give a right of action by the wife. *Quain v. Russell*, *Id.* 319; *Mulford v. Clewell*, 21 Ohio St. 191; *Woolheather v. Risley*, 38 Iowa, 486; *Hackett v. Smelsley*, 77 Ill. 109. And so a widow, dependent upon her son, may maintain an action for the sale of liquors to her son if it injures her means of support. *McClay v. Worrell*, 18 Neb. 44, 24 N. W. Rep. 429. So, too, as to a father, if dependent upon a son. *Stevens v. Cheney*, 36 Hun. 1; *Volans v. Owen*, 74 N. Y. 526, 30 Am. Rep. 337; *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323. See, also, *Mulcahey v. Givens*, 115 Ind. 286, 17 N. E. Rep. 598; *Beem v. Chestnut*, 120 Ind. 391, 22 N. E. Rep. 303; *Dunlap v. Wagner*, 85 Ind. 529; *Black, Intox. Liq. § 308*: These authorities, and many others which might be cited, seem to meet every objection which could be taken to the complaint in this case. In our opinion a sufficient cause of action was stated, and the court erred in sustaining the demurrer. Judgment reversed.

**NOTE.**—Recent Cases on the Liability of Vendors of Intoxicating Liquors under the Civil Damage Acts.—No traffic is more universally condemned, if we may judge from the statutes of the different States, than that of the retailing of intoxicating liquors commonly known as the saloon business. The

evils of intemperance have become so widespread and so generally recognized that legislatures have been compelled to experiment with every kind of remedy which might be suggested for correcting in some measure the evil tendencies of this traffic. Of all these remedies none have proven more effective from many standpoints than that system of statutory legislation known as the civil damage acts. These laws give to those who suffer from the intoxication of any person a cause of action against the one who furnished the liquor which brought about such intoxication. The effectiveness of such laws over criminal statutes lies in the fact that under the former it is not necessary that the facts be proven with the same strictness as under the latter, and for the further reason that the prosecution in the former case is in the hands of the party injured and not in the hands of a State's attorney who is not always free from bias in favor of the accused in such cases. A further consideration might be noticed that a dramshop keeper being generally under bond a money judgment is easily collectible and often works a greater hardship than the usual judgment of the courts in criminal prosecutions for the same offense.

Of course such statutes are right in the teeth of the common law, and especially the rule as to proximate cause applicable generally in cases of tort. For this reason they have often been opposed as unconstitutional and inequitable, especially in those cases in which the owner of the building has also been held liable conjointly with the dramshop keeper for injuries committed by a person under the influence of intoxicating liquor received on the premises. It is insisted very often that such laws are unconstitutional on the ground that they are an unwarrantable interference with private right. This together with many other technical points, however, have been brushed aside by the courts and the constitutionality of this class of legislation is now firmly established. *Bedore v. Newton*, 54 N. H. 117; *Kelter v. Nichols*, 28 Mich. 496; *Moran v. Goodwin*, 130 Mass. 168; *McGee v. McCann*, 69 Me. 147; *Weltz v. Ewen*, 50 Iowa, 34. In the case of *Moran v. Goodwin*, *supra*, it was held that the claim that such statutes are unconstitutional because in derogation of the contract of license itself could not be supported. The court said: "The license is not a contract. The license is simply an authority to sell according to law and subject to all the limitations, restrictions, and liabilities which the law imposes." In *Bertholf v. O'Reilly*, 74 N. Y. 509, it was held that if the statute authorizes a recovery against the owner or lessor of the premises on which the sale is made, he knowing and consenting to the carrying on of the traffic on such premises, it cannot be considered an unlawful "taking" of private property within the meaning of the constitution.

The following carefully selected cases will show the tendency of the courts toward a most liberal construction of these acts. A request to charge that it must be affirmatively proven that the defendant sold liquor to the plaintiff's husband as alleged in the petition should be denied is too narrow. *Jones v. Bates*, 26 Neb. 693. A defendant under these acts who contributed to the intoxication is liable for all damages caused thereby, although during the same period the intoxicated person purchased of others liquor which caused his intoxication in part. All contributing to the intoxication of the wrongdoer are liable. *Bryant v. Tidgewell*, 133 Mass. 86; *Steele v. Thompson*, 42 Mich. 594; *Mayers v. Smith*, 121 Ill. 442; *Hall v. Ger-*

*main*, 131 N. Y. 536. Many cases have arisen on this subject in which the defendant insisted that the injury was not the proximate cause of his act in furnishing the intoxicating liquor. The question of proximate cause, while one of not ordinary difficulty, in cases of tort is nevertheless much less difficult of solution under the civil damage acts, for the reason that such statutes in effect state that whenever any injury results from the intoxication of any person, the defendant's sale of the liquor which produces such intoxication shall be deemed the proximate cause. However, the intoxication itself must be the natural and proximate cause of the injury under the ordinary rules applicable to cases of tort. *Krach v. Heilman*, 53 Ind. 517; *Swinfin v. Lowry*, 37 Minn. 345. *Johnson v. Drummond*, 16 Ill. App. 641. In the last case cited, for instance, it was held that where a wife followed her intoxicated husband out into the street to see where he obtained his liquor, and the sidewalk being slippery she fell and injured herself, the fall was held to be not the natural and proximate consequence of her husband's intoxication. The following cases will show what the courts considered proximate cause in such cases: Where it appeared that a purchaser of liquor from the defendant became so intoxicated thereby that he had to be helped into his buggy when he started for home, and that he was afterwards found dead with his leg caught under the foot-bar of the buggy and his head hanging over between the body of the buggy and the wheel, it was held that the evidence sufficiently established the fact that intoxication was the proximate cause of the death. *Mead v. Stratton*, 87 N. Y. 493. Where a minor child, as a result of the sale of liquor to him, becomes intoxicated, and while in that condition wanders into a river and is drowned, the intoxication is the cause of the injury. *Boos v. State*, 11 Ind. App. 257. The intoxication is the proximate cause where an intoxicated driver mismanages his horses causing them to run away and to kill him; for the driver, but for his intoxication, might have prevented the runaway notwithstanding the fright of the horses. *Smith v. People*, 141 Ill. 447. Where the intoxication caused death whereby the plaintiff was injured in her means of support, it was held that under the statute it was immaterial whether such injury was the natural, reasonable and probable consequence of the defendant's act or the remote result thereof, that the statute did not distinguish between the two. It only required it to be established that the injury to support was the result of the intoxication caused in whole or in part by the liquor sold by the defendant. *McCarty v. Wells*, 51 Hun, 171. An intoxicated person, inflamed by liquor, quarrelled with an old enemy in a barroom where he got his liquor. He then left the barroom and picked a quarrel with the father-in-law of the man he hated. A general fight ensued, whereupon a cry of "Police" was raised, and all—drunk and sober—fled. While attempting to climb a steep railroad bank the intoxicated person missed his footing, fell, and broke his neck. Held, that the sale of the liquor to him was not the proximate cause of his death. *Roach v. Kelly*, 194 Pa. St. 24.

Other cases showing the exact limits of this subject may be profitably noted as follows: A saloon keeper who furnished a party partially intoxicated with liquor is liable for that person's death resulting from intoxication a few hours later though he drank during the time at other places. *Wanack v. Alexander*, 78 Ill. App. 356; *Baecher v. State*, 19 Ind. App. 100; *Carrier v. Bernstein*, 104 Iowa, 572; *Schick v. San-*

ders, 53 Neb. 664. The fact that under the law a father might be entitled to his son's wages or earnings, does not, where he has been divorced from his wife and the son lives with the mother, give him a right of recovery under the dramshop law for the sale of liquors to his son; that right is in the mother alone. *Lossman v. Knights*, 77 Ill. App. 670. In a suit for causing the intoxication of plaintiff's husband an instruction which advises the jury that a wife may be injured in her means of support, where her husband's ability to furnish her with the comforts of life is lessened or destroyed, although she may not be deprived of the bare necessities of life, is substantially correct. *Maloney v. Dailey*, 67 Ill. App. 427. In an action by a wife under Code 1873, sec. 1557, for damages for the sale of intoxicating liquors to her husband, the fact that the liquor drunk by the husband was bought by other persons does not preclude a recovery. *Carrier v. Bernstein*, 104 Iowa, 572. A married woman injured in person, property or means of support by reason of the unlawful sales of intoxicating liquor to a son, may maintain a suit for damages notwithstanding her husband, father of such son, be living. *McMaster v. Dyer* (W. Va.), 29 S. E. Rep. 1016. According to the general rule of the liability of the master for the acts of his servants, a saloon keeper is liable under the civil damage law for the acts of his employee even though done in disobedience of orders. *George v. Goebey*, 123 Mass. 289; *Gullikson v. Gjour*, 82 Mich. 503; *Barnaby v. Wood*, 50 Ind. 405; *Worley v. Spurgeon*, 38 Iowa, 465. Where an intoxicated husband, without actual violence but by abusive language and intimidation drove his wife out of the house and kept her out for several hours, it was held that she had been injured in her person so as to sustain the action, and that a substantial ground of action being thus shown she might also recover for the injury to her feelings from the indignity suffered by her. *Peterson v. Knoble*, 35 Wis. 80. Where liquor is sold to a minor whereby he becomes intoxicated and he thereafter becomes sick in consequence thereof, and the father is deprived of his services and is compelled to expend money for medical attendance upon him, the father may maintain an action under the civil damage law to recover the damages occasioned thereby. *Volens v. Owen*, 9 Hun, 558. A widow, who is dependent on her son for support, may maintain an action in her own name under the civil damage law against a liquor seller who, by his sales to the son, has deprived her of her means of support. *McClay v. Worrall*, 18 Neb. 44. An intoxicated person himself of course cannot, as a general rule, claim any of the benefits of the civil damage law against the owner who sold him the liquor, for injuries while in a state of intoxication resulting from such sale. *Brooks v. Cook*, 44 Mich. 617. In *Taylor v. Carroll*, 145 Mass. 95, the court uses these strong words in construing the right of those standing in domestic relation to the benefits of the civil damage law of that State: "The statute contemplates that the habitual drunkenness of the husband or wife, parent or child, is a substantial injury to those bound together in domestic relations, and gives such a right to recover damages in the nature of a penalty, not only for any injury to the person or property, but for the shame and disgrace brought upon them." A. H. ROBBINS.

## JETSAM AND FLOTSAM.

## TACT.

A very interesting quotation appears in *Rough Notes* on "Tact" as an essential in the make-up of a successful insurance agent. The subject is so excellently treated and so peculiarly applicable to those who would achieve success in the law, or for that matter in any avenue of occupation where man strives with man, that we have considered it something well worth repeating: "Talking is essential, but it isn't talking that gets business. For a thousand who can speak there is but one who can think, for a thousand who can think there is but one who can see. The successful solicitor has the open vision. There is no blind side to either his eye or brain. Watchful as a lynx, with every faculty of the intellect strongly concentrated upon the prospect, not a contingency escapes him. A factor so subtle in its nature, so incomprehensible in its relation to other elements, and so susceptible of marvelous growth under suitable conditions and by reason of thorough cultivation, baffles the English language for an abstract definition. The one word "tact" comes the nearest to it. Tact is defined as the ready power of appreciating and doing what is required by circumstances. Technically speaking, tact may mean touch, discrimination, wisdom or skill. Touch in the sense of manipulation—"throwing out a feeler"—discrimination in the sense of a nice perception or appreciation of difference, drawing fine lines, winnowing chaff from the wheat; wisdom in the sense of sagacity, grasp of intellect, acuteness, "having one's wits," "seeing through a mill stone;" and skill in the sense of expertness, cleverness, genius—"hitting the nail on the head." Tact is strong as Atlas, graceful as Venus, fleetfooted as Mercury. With senses all alert and mental faculties sharpened by practice, he has no time to dream the hours away in lazy indifference. He comprehends peculiar situations with a completeness that leaves out none of the details.

"Tact is the eighth wonder of the world. Memory is not tact, but tact never forgets. Perception is not tact, but tact can see through a brick wall. Reason is not tact, but tact somehow always gets the best of an argument. Talent is not tact, but tact has hasn't any folded in a napkin and laid away. Genius is not tact, but tact is most ingenious. Learning is not tact, but tact is versed in all the wisdom of the ages. Art is not tact, but tact is an artist. Science is not tact, but tact can apply scientific principles to men and things. Courage is not tact, but tact never pales with fear or hides his face with cowardice. Common sense intensified (another name for tact) has secured many applications where great learning, profound reason or sublime oratory has failed."

## AN UNFORTUNATE MISSOURI LAWYER.

*The Green Bag*, in its latest endeavor to interest the profession, has occasion to criticize quite sharply the brief of an unfortunate Missouri lawyer which lately came to its notice. Despite the fact that this member of the Missouri bar has not been too gently handled, he is to be congratulated upon the extended editorial mention which our esteemed contemporary has given him. His experience, however, will serve to warn the Missouri lawyer, who generally has to be "shown," as well as the overburdened practitioner of other States that their briefs, both in logic and syntax, must be above criticism, if they would escape severe editorial exposure. No doubt the action of our contemporary will tend to elevate the standing and

character of the profession in more than one direction. The criticism to which we have thus referred is as follows:

"The average appellate judge not only meets with frequent opportunities to enlarge his views of the law, but the forensic efforts of the bar often afford him a chance to polish and dilate his vocabulary. Not often, however, is he regaled with such weird linguistic and mental gymnastics as are presented in a Missouri attorney's brief which we have lately, through the courtesy of a correspondent, had the privilege of inspecting. The following excerpt, culled at random from that brief, is suggested as a legal gem worthy of preservation:

"The declarations of law asked for by plaintiff is in strict harmony with the authorities above cited, yet the trial court refused to so declare the law, and give the declarations asked for by the defendant, which are in direct conflict to all the law governing this case. We frequently find in practice the law so unsettled that it becomes necessary to secure judicial interposition, but in this case, there seems to be a unanimity of harmony in the various States of the Union characterized by an approval by the United States Supreme Court by an unbroken chain of decisions on the point here involved, and this court in the reports above referred to adhere to the same doctrine."

"It is hoped that the attorney will be able to secure 'judicial interposition' in this case, and that the 'unanimity of harmony' referred to will not be disturbed. The same attorney advises the Supreme Court of Missouri that 'The promoters of this scheme, beside all others, however large or small, stood pre-eminent. They were intoxicated with the idea of great wealth, they wanted immediate wealth, wealth in one day. They were money mad. Crazy for greed, wild with inflated ideas of gain, their ideas of the magic growth of Springfield surpasses the story of Aladdin's magic lantern.' Further along, alluding again to the 'magic lantern,' he alleges that 'These Aladdins of the nineteenth century could not work the combination.' Possibly the Missouri court may discover, when it comes to look into the devious methods of these Mammon smitten promoters, that Aladdin's lamp was, after all, only a cinematograph, concealed from our view by the terminology of oriental mysticism. Or, perhaps, this judicial investigation may reveal the fact that Aladdin was the real originator of the 'living picture' device. Strange to say the brief makes no allusion to the philosopher's stone, or to the purse of Fortunatus."

#### CORRESPONDENCE.

##### IS THE NATIONAL BANKRUPTCY LAW VALID?

To the Editor of the Central Law Journal:

The letter of Mr. Keaton (52 Cent. L. J. 390), concerning the validity of the national bankruptcy act, urges as "perhaps the most important violation of the rule of uniformity required by the constitutional provision," that provision of the act which recognizes the exemption laws of the States. Substantially the same provision is contained in section 5045, Revised Statutes of the United States, which was a part of the Act of 1867, amended in 1873. It led to considerable discussion, and Mr. Chief Justice Waite in *Re Eckert*, 10 N. B. R. 5, held the provision unconstitutional. His reasoning, however, is ably discussed, and, to my mind, answered by Judge Love in *Darling v. Berry*, 13 Fed. Rep. 659, at page 667, where

he says: "All that the constitution intends is that congress shall not pass partial revenue and bankrupt laws. It shall not prescribe one law for this State or section, and a different law for that State or section. The law must be general and uniform in its provisions, but its working and operation may be very different in different States, owing to their diverse conditions and circumstances. Congress can prescribe a uniform law, but it cannot create uniform conditions and circumstances in the various States of the Union." While the constitutionality of section 5045 was never before the supreme court, it is of interest to note that it has been referred to *arguendo* in an opinion of that court as "clear evidence of the policy of congress." *Fink v. O'Neil*, 106 U. S. 272-283. Whether it is constitutional or not, however, the existing bankruptcy act is far from being a master piece of legislation.

JAMES L. HOPKINS.

#### HUMORS OF THE LAW.

A Polish Jew was arrested the other day, and when taken to prison his condition was so uncleanly that he was told by the jailer to strip and take a bath. "Vat, go in de water?" he asked. "Yes, take a bath; you need it. How long is it since you had a bath?" With his hands aligned upward, he answered: "I never was arrested before."

In a recent suit before Judge E. J. Broadus of Missouri against a railroad company for injuries sustained by the plaintiff in a collision, the attorneys for the defendant contended that a verdict of \$2,000 was excessive in view of the fact that the plaintiff was an old man with but a few years to live. Judge Broadus, who is a man of about 70 years of age himself, thus disposes of the contention: "It is true the plaintiff is an old man, but that fact does not militate against his right to compensatory damages for his injuries. He is justly entitled to the free use of his limbs without pain and suffering the remainder of his life. And if the natural infirmities of age have been aggravated by the wrong he has suffered, it is no answer to his claim for damages to tell him he is old and is near the end of his race. And while this fact, perhaps, ought not to entitle him to more damages than a young man, it certainly in this kind of case is not an argument for lessening his real loss. The matter is not to be measured by the same rule as would be applied to an old horse turned upon the common to starve, because of his want of value."

Thomas B. Reed and former Attorney-General John W. Griggs have engaged offices in the same building in Jersey City, Mr. Grigg's office being immediately above the office of Mr. Reed. "Lucky thing for Griggs," said Mr. Reed, "that he will be on top of me instead of beneath me."

"Didn't I tell you not to let me see you here again?" said the angry justice to a son of Ham who had been brought up for his second offense in roost spoliation. "Yes, sah," replied the offender, "dat's what I tole dis consterple gem'man."

#### BOOKS RECEIVED.

The American Digest, Annotated, continuing without Omission or Duplication the Century Edition

of the American Digest, 1658 to 1896, 1900B. A Digest of all Current Decisions of all the American Courts, as reported in the National Reporter System, the Official Reports, and elsewhere, together with Leading English and Canadian Cases, from April 1, to September 30, 1900. Prepared and edited by the Editorial Staff of the American Digest System. St. Paul, Minn. West Publishing Co., 1901.

The Law of Real Property, being a complete Compendium of Real Estate Law, embracing all Current Case Law, carefully selected, thoroughly annotated and accurately epitomized; comparative statutory construction of the Laws of the Several States; and exhaustive treatises upon the most important branches of the Law of Real Property. Edited by Emerson E. Ballard, editor of "Deed Forms Annotated," and one of the authors of "Ballards' Real Estate Statutes of Indiana," "Ballards' Real Estate Statutes of Kentucky," "Ballards' Ohio Law of Real Property." Vol. 7. Logansport, Ind. The Ballard Publishing Co.

## WEEKLY DIGEST

**OF ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.**

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1. ADMINISTRATION—Debt Due Administrator—Limitations.—An administrator has no right to pay to himself a debt due to him by his intestate when the same was barred by the statute of limitations before the intestate's death.—BECKHAM V. BECKHAM, Ga., 38 S. E. Rep. 817.

2. ADMINISTRATION—Lease by Administrator.—A lease of a decedent's land by an administrator, with the knowledge of the heirs and without their dissent, for the purpose of paying the debts of the estate with the rent, was valid.—ASHLEY V. YOUNG, Miss., 29 South. Rep. 822.

3. AGENCY—Action for Services.—In this case one of several owners of stacks of grain authorized the other owner to employ a person operating a threshing outfit to thresh the grain, and to have the work done by a particular person. The party so authorized to make the bargain employed another than the one

designated to do the work. Such agency, under the facts found, was general, and the party employed, after the work was accepted, could recover his pay for his work, or the share thereof due from each of the owners respectively.—COGGINS V. HIGBIE, Minn., 85 N. W. Rep. 990.

4. ASSAULT AND BATTERY—Self-Defense.—To justify the use of force on the ground of self-defense, it is not essential to show that in fact it was necessary to use such force in order to protect the defendant from imminent personal injury; for it is sufficient if it appears that the necessity was real or apparent. But the mere belief of the defendant that it is necessary to use force is not alone sufficient to make out a case of self-defense; for the facts as they appear to him at the time must be such as to reasonably justify the belief.—GERMOLUS V. SAUSSER, Minn., 85 N. W. Rep. 946.

5. ASSIGNMENT—Costs.—The mere fact that one is a partner of a firm owning a part of logs driven under a "pooling" arrangement between the owners thereof does not prevent him from purchasing lienable claims in his own behalf, and enforcing them against the logs driven, and such purchase does not constitute payment nor extinguish the liens.—DUFUR V. PAULSON, Wis., 85 N. W. Rep. 965.

6. ATTORNEYS—Admission.—Though Act March 8, 1901, prescribing the requirements for admission to practice law, failed to make provision for those who had been engaged in the practice by virtue of a certificate of the circuit courts, such persons had a vested right, of which they could not be deprived by legislation, and are not obliged to submit to the examination required by said act.—IN RE APPLICATIONS FOR ADMISSION TO PRACTICE, S. Dak., 85 N. W. Rep. 992.

7. BILLS AND NOTES—Alteration.—A clerk of plaintiff corporation inserted in a note executed by defendant the name of a certain bank as the place of payment, merely as a memorandum, to which it was to be sent for collection. The clerk's duty was to keep a record of plaintiff's notes, but she had no authority to bind the corporation, and no officer authorized to make a binding alteration had any knowledge of the insertion. Held, that the insertion did not avoid the note, since it was a mere spoliation by a stranger, and not an alteration.—PORT HURON ENGINE & THRESHER CO. V. SHERMAN, S. Dak., 85 N. W. Rep. 1008.

8. BILLS AND NOTES—Fraud.—Where a note payable to order is assigned, the maker in an action thereon can, under the statute, show, as against the assignee, that the note was procured by fraudulent representations.—KENNEDY V. JONES, Miss., 29 South. Rep. 819.

9. BUILDING ASSOCIATIONS—Enforcement of Loan.—The constitution and by-laws of a building association provided that the shareholders should not have any claim to any interest in the affairs or funds of the association, nor any control of them, except as specifically set forth in the by-laws, and should assume no further liability except as therein prescribed. A borrower from a building association thereafter purchased, with the consent of the association, certain shares of its stock, and after the assignment thereof fully paid up installments thereon, and all the interest, until the time when, under the terms of the stock certificate, he became entitled to receive from the plaintiff the sum agreed upon in said certificate. In the meantime, and after the maturity of the certificate, the association went into voluntary liquidation. Held, that in proceedings by the association to enforce its loan the borrower was entitled to set off the full amount agreed to be paid under the certificate, and not its depreciated value.—PIONEER SAVINGS & LOAN ASSN. V. WILKINS, S. Dak., 85 N. W. Rep. 995.

10. CARRIERS—Unlawful Discrimination.—24 Stat. 879, declares that if any common carrier shall receive from any person a greater or less compensation for any service rendered than it receives from others for a like service, such carrier shall be guilty of unjust discrimination, which is declared to be unlawful.

Held, that where plaintiff sued a railroad company to recover certain chattels without first paying freight charges thereon according to the company's published schedule, and plaintiff claimed that an agreement, whereby transportation charges were to be less than the published schedule, there could be no recovery, such contract being unlawful as to both parties.—*CHURCH V. MINNEAPOLIS & ST. L. RY. CO.*, 8. Dak., 85 N. W. Rep. 1001.

11. **CARRIERS—Unloading Cattle.**—Plaintiff shipped cattle on the defendant road under a special contract to load and unload them at his own risk, in consideration of a lower rate. Plaintiff unloaded them early in the morning without notifying defendant's agent, and used a defective chute found on the premises, belonging to defendant, and one of the steers was injured by falling through the chute. Held, that it was proper to charge that if the jury should find that plaintiff undertook to unload the cattle before daylight, without notice to defendant, and in so doing used a chute which he knew was defective, he was guilty of negligence, and could not recover, irrespective of the shipping contract.—*ANDER V. NEW YORK, ETC. R. CO.*, Conn., 49 Atl. Rep. 17.

12. **CARRIERS—Wrongful Ejection of Passengers—Damages.**—Plaintiff testified that he got on defendant's train, which was crowded, and that he gave his ticket to the conductor, who afterwards asked for it again, and denied receiving it. The two boys who were in company with plaintiff told the conductor that he had it, but the latter ordered plaintiff to leave the train. He got off when the conductor again ordered him to do so, but immediately got back on the train, and was carried to his destination. The two boys corroborated plaintiff's testimony. The conductor testified that plaintiff never gave him a ticket, and that after leaving the train he got on again, and rode. Held sufficient to sustain a judgment against the company for the wrongful ejection of plaintiff. Damages for such ejection in the sum of \$2,000 is excessive, and sufficient to warrant a reversal, in the absence of a remittitur reducing the judgment to \$1,000.—*ALABAMA V. RY. CO. V. BELL*, Miss., 29 South. Rep. 818.

13. **CONSTITUTIONAL LAW—Vested Right—Judgment of Justice.**—A judgment of a justice of the peace for a penalty gives a vested right in the penalty, which, notwithstanding an appeal to the superior court, can be taken away only by reversal on the original merits, and not by act of the legislature remitting the penalty, a justice's judgment being a final judgment, which remains in force till reversed, though execution thereof may be stayed by giving an undertaking as provided by Code, §§ 882-889, and though the trial in the superior court is *de novo*.—*DUNHAM V. ANDERS*, N. Car., 88 S. E. Rep. 832.

14. **CONTRACTS—Evidence.**—Where an employee of one of the members of a firm was seriously injured by machinery, and the person who telephoned to the surgeon, who thereupon attended such employee, testified that both the members of the firm directed him to say to the surgeon that the firm sent for him, a verdict against the firm for the surgeon's bill for such attendance should not be set aside, as unsupported by the evidence.—*TILL V. REDUS*, Miss., 29 South. Rep. 822.

15. **CONTRACT—Written—Oral Modification.**—Where plaintiff sold a binder to defendant by written contract, and defendant alleged a parol modification of the written contract by plaintiff's agent, the essential question was whether or not the minds of the parties met, and whether it was mutually understood that the written contract should be changed; and hence a special question which assumed that, if the jury found that a certain conversation occurred after the making of the written contract, the same was changed thereby, did not submit the vital issue, and was prejudicial error.—*WARDER, BUSHNELL & GLESSNER CO. V. FISCHER*, Wis., 85 N. W. Rep. 968.

16. **CONTRIBUTORY NEGLIGENCE—Violation of Statute.**—If a person in charge of a traction engine weighing over five tons attempts to cross a highway bridge without spanning it with planks, as required by Laws 1891, ch. 367, he cannot recover for personal injuries occasioned by its insufficiency and want of repair.—*WELCH V. TOWN OF GENEVA*, Wis., 85 N. W. Rep. 970.

17. **CORPORATIONS—Insolvency—Unpaid Subscriptions.**—Under the provisions of section 5897, ch. 76, Gen. St. 1894, authorizing actions against insolvent corporations (after judgment and execution returned unsatisfied) to sequester their property and recover unpaid subscriptions of stock, such action may be brought by the assignee of such judgment, as well as by the judgment creditor himself.—*ARGALL V. SUL-LIVAN*, Minn., 85 N. W. Rep. 931.

18. **DAMAGES—Earning Capacity.**—Under a general allegation of damages in an action for personal injuries, evidence of the amount of wages received by plaintiff before the injury, and the amount he received after, and that he received no more before and no less after than he was able to earn, is competent and proper, as tending to prove the diminution in his earning capacity, and as bearing upon the question of general damages.—*PALMER V. WINONA RY. & LIGHT CO.*, Minn., 85 N. W. Rep. 941.

19. **DAMAGES—Injury to Horse.**—Where a city was liable for injuries to a horse by falling into an open ditch in the highway, the measure of damages was the difference in value of the horse before the injury and after he was cured, and, in addition thereto, the cost of care and medicine in restoring the horse. Where a buggy is injured by defects in a highway for which a city is liable in an action to recover therefor, plaintiff can prove the cost of repairs, the amount to be recovered being only the actual cost value of such necessary repairs.—*OVERPECK V. CITY OF RAPID CITY*, S. Dak., 85 N. W. Rep. 990.

20. **DEED—Construction—Beneficiaries.**—A deed of gift to land, executed and delivered in 1893, directly to a married daughter "and her children or child should any be born to her, she having no child at that time, and, in the event she should die without any child or children in life, then said land is to revert unto the donor, if living at the time of revision and, if not living, then to his legal heirs," conveys the fee to the daughter, subject to be divested in favor of the donor or his legal heirs upon her dying without leaving a child in life at her death.—*DAVIS V. HOLLINGSWORTH*, Ga., 38 S. E. Rep. 827.

21. **DEED AS MORTGAGE—Absolute Conveyance.**—Defendant purchased land by paying \$440 in cash, and giving a mortgage for \$1,060. He borrowed the money from T, to whom he was also indebted for about \$600, and executed a second mortgage to T to secure the entire debt. Defendant afterwards made default, and T paid the taxes on the land, as well as a portion of the deferred purchase price, and the land was finally conveyed by defendant to T to prevent a foreclosure; the latter assuming the balance due on the first mortgage, and canceling defendant's notes, without returning them. T, and the agent transacting all the business, testified that it was understood that the conveyance was absolute, and defendant testified that he understood that it satisfied the notes. The land was worth much less than the debts assumed and released by T. The defendant was allowed to continue in possession under an agreement to pay the taxes, and T repeatedly offered to allow him to redeem on the payment of the amount paid by the latter. Held sufficient to sustain a finding that the deed was intended as an absolute conveyance, and not as a mortgage.—*LARSON V. DUTIEL*, S. Dak., 85 N. W. Rep. 1006.

22. **EASEMENTS—Change of Location of Windows—Disease.**—Where a building having an easement of light and air pertaining to certain windows is raised, by which the location of the windows is substantially changed, the easement is not continued as to such windows in their new position. Where windows, to

which an easement of air and light pertains are permanently closed for over 40 years, and no effort to reopen such windows has been made, equity will not enjoin the erection of a building on an adjoining lot which will interfere with such easement if it still exists.—*JOHNSON V. HAHNE*, N. J., 49 Atl. Rep. 5.

23. **EVIDENCE—Documentary Evidence.**—There is in this State no law or rule of evidence which authorizes the admission of a letter or certificate from the commissioner of patents of the United States to show what does not appear upon the records of his office.—*DANIEL V. BRASWELL*, Ga., 88 S. E. Rep. 829.

24. **EVIDENCE—Judicial Notice.**—Courts will take judicial notice of legislative enactments and of the records kept by the two houses of the legislature.—*STATE V. FRANK*, Neb., 85 N. W. Rep. 956.

25. **EVIDENCE—Legislative Journals.**—Extrinsic evidence may not be received to contradict legislative journals, but such evidence is competent to supply missing portions of the journals, which had become detached through accident or design.—*STATE V. FRANK*, Neb., 85 N. W. Rep. 956.

26. **EVIDENCE—Lease—Execution.**—Where plaintiff sued on a guaranty annexed to a lease, evidence that the lease had been sent by mail to the lessee, that he received and returned it to plaintiff with lessee's name signed thereto, and that he afterwards occupied the rooms which were the subject of the lease, was sufficient *prima facie* proof of the execution of the lease to authorize its admission in evidence.—*GARLAND V. GAINES*, Conn., 49 Atl. Rep. 79.

27. **EVIDENCE—Relevancy.**—In a controversy between two persons regarding a given subject-matter, evidence as to what occurred between one of them and a third person with reference to a similar, though entirely distinct transaction is irrelevant.—*MERCHANTS' NAT. BANK OF ROME V. GREENWOOD*, Ga., 88 S. E. Rep. 826.

28. **EVIDENCE—Scientific Works.**—On an issue to the identity of a horse, a work on veterinary science is not admissible to inform the jury how to determine a horse's age from an examination of the teeth.—*BRADY V. SHIRLEY*, S. Dak., 85 N. W. Rep. 1002.

29. **EXECUTION—Attachment—Judgment.**—Plaintiff, in addition to a judgment against the defendant for the debt sued for, cannot, in the same action, have judgment subjecting to satisfaction of the judgment obtained property attached, the one in possession of and claiming it not being a party, and not having intervened; the remedy is by execution.—*POST-GLOVER ELECTRIC CO. V. MCENTER-PETERSON ENGINEERING CO.*, N. Car., 38 S. E. Rep. 881.

30. **FEDERAL JURISDICTION—Removal of Causes.**—Where a non-resident defendant in an action for over \$2,000 files a sufficient petition and bond for a removal to the federal court in the office of the clerk of court where the action is pending, before the return day therein, it is sufficient to divest the jurisdiction of the State court, though no order of removal is made.—*RICHARDS V. MODERN WOODMEN OF AMERICA*, S. Dak., 85 N. W. Rep. 969.

31. **GARNISHEE—Disposal of Property.**—Where a garnishee was discharged, and there was no order continuing the lien on the property pending an appeal, and before a reversal of the case the garnishee had disposed of a part of the property, he should be charged on the new trial only with the property which remained in his hands at the time of the reversal.—*STANWARD V. YOUNG*, Wis., 85 N. W. Rep. 967.

32. **HIGHWAYS—Commissions—Discretionary Powers.**—Under Acts 1900, ch. 246, creating a board of county road commissioners for Prince George county, and empowering it to use certain funds "in the construction of permanent highways, beginning at the line of the District of Columbia, at the end of some highway therein, and building out into the county upon existing public roads," the board is authorized to select some

particular roads for improvement, and is not required to apply the funds proportionately to the improvement of all the roads beginning at the line and extending into Prince George county. Where a suit to enjoin a board of road commissioners from using a fund to improve certain roads to the exclusion of others, on the ground that its discretion was improperly exercised to benefit the property of two of its members, is heard on bill and answer denying the allegations of the bill, and no evidence is introduced by plaintiff, the answer is evidence for the defendants, and the preliminary injunction will be dissolved.—*BLURDON V. CROSBIE*, Md., 49 Atl. Rep. 2.

33. **INJUNCTION—Irreparable Injury—Remedy at Law.**—Where plaintiff alleged that he was the owner of certain ice, which he allowed defendant to cut and store on premises occupied by defendant, under agreement that both parties were to use the ice, but that defendant was preventing plaintiff from using it, and that plaintiff's dairy business would be destroyed, he was not entitled to an injunction, as he might obtain ice elsewhere, and he had not alleged that defendant could not respond in damages.—*GLASSBURNER V. GROULIX*, Wis., 85 N. W. Rep. 962.

34. **INSURANCE—Agency—Insurable Interest.**—A tenant at will being entitled, under the statute, to 30 days' notice, before he can be dispossessed, has therefore a term of definite, fixed possession, which is insurable. A party in possession of property under an agreement with the owner to pay the insurance thereon has a right, as agent, to insure the property for the owner's benefit; and if an insurance company, with knowledge of the facts, issues a policy in the name of such person in possession, it cannot escape liability on the ground that he had no interest in the subject-matter.—*SCHAEFFER V. ANCHOR MUT. FIRE INS. CO.*, Iowa, 85 N. W. Rep. 985.

35. **INTERNAL REVENUE STAMPS—Chattel Mortgage.**—Where plaintiff, on taking a chattel mortgage securing 12 notes, placed a United States revenue stamp on each note, but none on the chattel mortgage without intent to defraud the revenue, but with the belief that the stamps on the notes were sufficient, the mortgage was valid and binding upon the parties in a statement.—*PLUNKETT V. HANSEKA*, S. Dak., 85 N. W. Rep. 1004.

36. **INTERPLEADER—Identity of Claim.**—Where an insurance company issued a policy on the life of P, payable at his death to his wife, if living, and, in case she died before him, to her children, and, on notice that the wife had assigned her interest to P, issued another policy, payable to his estate, there was a question as to whether the company was not liable on the original policy to the wife's children surviving after her death before that of P, and also on the re-issued policy to the assignees of P; and hence, as these two classes of claimants were not claiming under the same right, the company was not entitled to an order requiring them to interplead.—*CONNECTICUT MUT. LIFE INS. CO. V. TUCKER*, R. I., 49 Atl. Rep. 27.

37. **JUDGMENT—Motion to Set Aside.**—Where a judgment was rendered at chambers, and no exception thereto was taken within the time prescribed by law, it was too late at the next or any subsequent term of the court to move to set such judgment aside for mere error in the rendition thereof.—*BAKER V. BAKER*, Ga., 38 S. E. Rep. 518.

38. **LANDLORD AND TENANT—Landlord's Lien.**—An assignment before maturity of a written contract for rent does not operate to raise in favor of the assignee the special statutory lien on crops given to landlords, when it appears that before the maturity of the crops on the rented premises the consideration of such contract had entirely failed.—*CAMP V. WEST*, Ga., 88 S. E. Rep. 822.

39. **LANDLORD AND TENANT—Landlord's Lien.**—Where, in the foreclosure of a landlord's lien, the de-

fendant contested the lien and gave a replevy bond for the eventual condemnation money, and the case was appealed to the superior court, where the jury found against the defendant, it was legal and proper to enter up judgment against the defendant, and also against the sureties on the replevy bond, without further notice to them.—CIV. Code, §§ 2817, 5342.—PEPPERS V. COIL, Ga., 38 S. E. Rep. 823.

40. LIMITATION OF ACTIONS—Charge—Pending Contracts.—Const. 1890, § 104, providing that "statutes of limitations in civil causes shall not run against the State or any subdivision or municipal corporation thereof," stopped the running of the statute against counties on pending contracts where the bar was not complete.—BOARD OF SUP'RS OF WAYNE COUNTY V. HELTON, Miss., 29 South. Rep. 820.

41. LOGGING HIGHWAY—Establishment.—Rev. St. 1898, § 12991, providing that when a proper petition for a temporary logging highway has been presented to town supervisors "such supervisors shall proceed to lay out such highway in the manner in which public highways are laid out, except as otherwise provided herein," relates solely to the action and course of procedure of the supervisors, and gives no right of appeal to the county judge, to either petitioners or landowners from their decision, as in proceedings to lay out permanent highways.—STATE V. WALLMANN, Wis., 85 N. W. Rep. 975.

42. MARRIAGE—Evidence.—Where the issue was whether a certain woman was the wife of plaintiff, and plaintiff testified that he married her at a certain place at a certain time, the ceremony being performed by a minister of the gospel, that they lived together as husband and wife continuously thereafter for 17 years, and that two children were born, the evidence was sufficient to show the marriage; record evidence being unnecessary.—MATHEWS V. SYLVANDER, S. Dak., 85 N. W. Rep. 998.

43. MASTER AND SERVANT—Death of Servant—Want of Negligence.—A widow cannot recover from a railroad company for the homicide of her husband, who was killed while engaged in his duties as an employee of the company, when the evidence on which she relies fails to show either that the deceased was without fault or that the company was negligent. (a) Applying this familiar rule to the facts of the present case, the judgment of nonsuit was right.—ELLIOTT V. WESTERN & A. R. CO., Ga., 38 S. E. Rep. 821.

44. MASTER AND SERVANT—Injury to Employee—Assumption of Risk.—Plaintiff had for five years been employed in paper mills, and for some three months with defendant, before the injury for which he sues. He was accustomed to use in his work a pine board, pivoted by a bolt at one end, and resting loosely at the other on a smooth iron plate, covered with grease. Held, that the risk of the wearing of a pine plank, continually swinging around on an iron bolt as a pivot, and the probability of its slipping on the smooth iron surface, was plain to plaintiff, and he must be deemed to have accepted the risk. Failure on the part of plaintiff to observe the want of repair of the plank was as inconsistent with due care on his part as on the part of his employer, and he must be held to have assumed the risk of such want of repair by continuing in the employ without protest.—RELYEA V. TOMAHAWK PULP & PAPER CO., Wis., 85 N. W. Rep. 960.

45. MASTER AND SERVANT—Injury to Employee—Assumption of Risk.—Even if the evidence was sufficient to warrant a finding that the master furnished to the employee an unsafe and dangerous appliance with which to do the work in which the former was engaged, it certainly required a finding that he, by the exercise of ordinary diligence, could have discovered the fact that the appliance was not safe; and, this being so, there could not lawfully be a recovery against the master, and it follows that the court erred in not sustaining the motion for a new trial on the general

grounds thereof.—WESTERN & A. R. CO. V. BRADFORD, Ga., 38 S. E. Rep. 823.

46. MASTER AND SERVANT—Injury to Employee—Burden of Proof.—To make a *prima facie* case for a recovery against a railroad company by the widow of an employee, suing for the homicide of her husband, resulting from an act in which he participated, it must be shown either that he was not to blame, or that the company was. The burden of showing that the agents of the company have exercised all ordinary and reasonable care and diligence is not imposed upon the company in such a case until the plaintiff has *prima facie* established one or the other of the propositions above referred to.—WESTERN & A. R. CO. V. JACKSON, Ga., 38 S. E. Rep. 820.

47. MORTGAGE—Foreclosure—Senior Mortgage.—May, 1894, defendant and wife executed a mortgage to plaintiff, which was recorded December 23, 1895. On October 1, 1892, defendant and wife executed a mortgage on the same property to R, which was recorded in March, 1895. Plaintiff's mortgage became due October 1, 1894, and that of R October 1, 1895. Plaintiff brought foreclosure, and alleged that defendant's debt to R was fraudulent, and prayed for general relief. Defendant's answer admitted the execution of the mortgage to plaintiff but denied that R's mortgage was fraudulent or paid, and R answered, denying fraud or payment. Held, that a decree dismissing the bill was erroneous, since, on the pleadings, plaintiff was entitled, under his prayer for general relief, to redeem from the senior mortgage, and subject the equity of redemption.—HARTMAN V. MOORE, Miss., 29 South. Rep. 820.

48. MORTGAGE—Separate Tracts.—A mortgage covered two pieces of property. After a decree in foreclosure, the interest of the mortgagor in one of the pieces was sold at a receiver's sale at the instance of a judgment creditor, and the sale was confirmed, the creditor becoming the purchaser. Thereafter he sold the interest of the mortgagor in the other piece under execution, and became a purchaser at such sale. He then made valuable improvements on the first piece, with the consent of the mortgagor. The time for redemption from the execution sale not having expired, the mortgagor moved to compel the mortgagee to sell under his foreclosure decree, so that he could ascertain the amount of the lien on the second piece, and the amount of any deficiency decree, if there should be one. The mortgagee filed a consent that, when the title of the purchaser of the second piece should become absolute, or when the mortgagor redeemed the premises from sale, the mortgagee would release all interest in the property vested in him by the foreclosure. Held that, inasmuch as the mortgagor had no right of redemption in the first piece of land, as it was sold by the receiver and the sale had been confirmed, the motion was properly denied, and the order confirming the stipulation would be affirmed.—LEONARD V. FRAZER, Mich., 85 N. W. Rep. 959.

49. MUNICIPAL CORPORATIONS—Action on City Warrants.—Where, in an action on city warrants, plaintiff based his right to recover on the fact that defendant had failed to levy taxes to pay the general fund warrants issued by the city, and had used money belonging to that fund in paying other warrants, instead of applying it to the proper payment of warrants in the order of their presentation, plaintiff could show on cross-examination of defendant's witnesses that moneys had been so appropriated by the city to the current fund, instead of being applied to warrants as presented.—BLACKMAN V. CITY OF SPRINGS, S. Dak., 85 N. W. Rep. 996.

50. MUNICIPAL CORPORATIONS—Ordinances—Power of Repeal.—Acts 1898, ch. 123, § 25, new city charter of Baltimore, providing that all municipal officers in office at the passage of the act shall hold their offices under existing ordinances as if that article had not been passed, until their successors were appointed, did not prevent the repeal of ordinances relating to

city offices, so that an official holding under a then existing ordinance was entitled to hold after the ordinance under which he claimed had been repealed, and his office abolished, but only continued such officials in office subject to the right of the mayor and council to abolish their offices; and hence an assessor appointed by the mayor under City Code 1893, art. 50, § 2a, was not entitled to receive compensation after this section was repealed by Ordinance No. 28 of Ordinances of 1899-1900.—*ROBINSON V. MAYOR, ETC. OF CITY OF BALTIMORE, Md.*, 49 Atl. Rep. 4.

51. **MUTUAL BENEFIT ASSOCIATIONS—Suicide.**—In an action on a life insurance policy, where defendant claimed that assured suicide, and the attending physician, in the proofs of death, gave suicide as the cause of death, but the evidence merely showed that from three to five minutes after deceased was seen on the street he was found dead in his place of business, with a bullet in his brain, and a revolver with one empty chamber lying in a pool of blood under one of his limbs, the facts were not so necessarily indicative of suicide as to justify the court in refusing to submit the case to the jury.—*DISCHNER V. PIQUA MUT. AID & ACCIDENT ASSN. OF PIQUA, OHIO*, S. Dak., 85 N. W. Rep. 998.

52. **NEGLIGENCE—Elevators.**—Starting an elevator while the door remains open, and while a passenger is entering the car, is negligence.—*BLACKWELL V. O'GORMAN CO., R. I.*, 49 Atl. Rep. 28.

53. **NEGLIGENCE—Street Railways—Injuries to Children.**—A motorman, when some 60 feet from a street crossing, seeing a five-year old girl about 12 feet from the track, and starting to cross it, applied the brake and sounded the gong. The child moved forward, looking at the car, and stopped about 3 feet from the track, on which the motorman released the brake. When the car was within about 6 feet of the crossing the child suddenly started to cross, and was run over and killed. The motorman testified that he was running at the rate of 8 miles per hour, while one witness testified 12, and another 16, miles per hour. The car stopped about 60 or 70 feet from the crossing. Held, that the motorman was not guilty of negligence entitling plaintiff to recover.—*TISHACK V. MILWAUKEE ELECTRIC Ry. & LIGHT CO., Wis.*, 85 N. W. Rep. 971.

54. **NOTICE—Village Election.**—The village council of the village of Detroit, upon petition duly presented under chapter 209, Laws 1893, duly called a special election, pursuant to the provision of sections 1216, 1217, Gen. St., for the purpose of voting upon the proposition contained in the petition,—a proposal for the construction and equipment by the village of an electric light plant. The resolution calling for the election provided that 10 days' notice of the same should be given by posting notices in three of the most public places of the village, and also by publishing the resolution. The notices were duly posted as required, but the resolution was not published 10 days before the election. Held, that the failure to publish the resolution 10 days before the date set for the election was not fatal to the validity thereof, inasmuch as the statutes were fully complied with by the proper posting of the notices.—*HAMILTON V. VILLAGE OF DETROIT, Minn.*, 85 N. W. Rep. 933.

55. **PARTITION—Clause in Deed—Reservation.**—Where owners of land in common, who each own in severalty a portion of a house situated thereon, execute deeds to each other for the purpose of partitioning the land, and such deeds specifically describe the boundary of the land passing through the house, a clause in each of the deeds that the internal division of the rooms and stairways of the house shall remain the same as formerly occupied, the former division of the upper floor being different from that of the lower, has no reference to the boundaries of the land, and hence the deeds are not ambiguous in describing the land by the inconsistent boundaries.—*BARTLETT V. BARROWS, R. I.*, 49 Atl. Rep. 31.

56. **PRINCIPAL AND SURETY—Bail—Defective Indictment.**—Sureties upon a criminal recognizance may set up, in defense to a *scire facias* to forfeit the same, that the indictment against their principal is fatally defective, in that it fails to charge any offense against the penal statutes of the state.—*CANDLER V. KIMSEY, Ga.*, 38 S. E. Rep. 825.

57. **RAILROADS—Fright of Horse.**—Where, in an action against a railroad company for personal injuries alleged to have resulted from plaintiff's horse having become frightened by the improper and unnecessary emission of steam from one of the company's engines, one of the defendant's main defenses is that no steam whatever was at the time of the injury emitted from its engine, it is error for the court to fail to submit this issue to the jury in his charge. This is true although there was no request to charge upon this subject.—*CHATTANOOGA & D. R. CO. V. VOILS, Ga.*, 38 S. E. Rep. 819.

58. **REFERENCE—Judgment.**—An action upon an open account, with a bill of particulars attached, to which no defense was interposed save that of payment, is not one which could properly be referred to an auditor.—*BUEH V. MURPHY, Ga.*, 38 S. E. Rep. 828.

59. **REPLEVIN—Counterclaim—Breach of Warranty.**—Under Rev. St. 1898, § 2656, subd. 1, authorizing a cause of action arising on the contract or transaction set forth in the complaint or connected with the subject of the action to be pleaded as a counterclaim, the defendant in replevin by a mortgagee to recover possession of the mortgaged property, which was sold to the defendant, and the mortgage given to secure the purchase price thereof, may counterclaim damages arising from a breach of warranty of the goods sold.—*AULTMAN CO. V. McDONOUGH, Wis.*, 85 N. W. Rep. 980.

60. **SALES—Breach of Contract—Delay in Performance.**—In a suit for breach of contract to accept certain grain which defendant refused because of delay in shipment, failure to instruct the jury as to the question of reasonable time in the performance of the contract is error.—*SOPEH V. TYLER, Conn.*, 49 Atl. Rep. 18.

61. **SCHOOL HOUSE—Selection of Site.**—In 1881 the officers of appellant school district purchased a site for a school house, erected a school house thereon, and the district has ever since continued to use and occupy the same for the educational and school purposes. All the records of the district relating to the selection and designation of such site by the voters have been lost. Held that, in view of such facts, it must be presumed that the site for the school house was selected and designated by the legal voters of the district, and that the officers, in purchasing the same and in erecting the school house thereon, acted within the scope of their authority. The burden to show that the site was not designated by such voters was upon the defendants.—*WEBB V. SCHOOL DIST. NO. 3 OF LAC QUI PARLE CO., Minn.*, 85 N. W. Rep. 982.

62. **SCHOOL TOWNSHIP—Liability for Debts.**—A school township organized under chapter 44 of the Laws of 1883 became by such organization *ipso facto* liable for the debts of the old districts whose territory was included in such township. When a judgment is obtained against such a township on an indebtedness of a school district, and subsequent to the entry of such judgment the township is divided into two school districts, the judgment creditor may proceed to enforce such judgment against such districts, and each will be required by *mandamus* to levy a tax sufficient to pay its *pro rata* share of such indebtedness, based upon the amount of its taxable property.—*COLER V. COPPIN, N. Dak.*, 85 N. W. Rep. 969.

63. **SHIPPING—Landing Cargoes.**—Where plaintiff agreed to transport a cargo of goods and deliver them at a certain wharf, and on arrival at the designated place no wharf existed, the refusal of plaintiff to

build one constituted no defense to an action for the freight.—*MCCAUGHN V. MILLIOT*, Miss., 29 South. Rep. 818.

64. **SLANDER AND LIBEL**—Matter Libelous Per Se.—Plaintiff was soliciting subscriptions for a directory which he was about to publish, when there appeared in a newspaper an article headed "A Warning," to the effect that "certain unscrupulous persons were making a canvass of the city for the purpose of a directory," and "falsely represented that defendants did not intend to publish a directory that year;" that these "untruthful adventurers" knew it was possible for them to secure business only by misrepresentation; that the people of the city had had experience with "wandering fakirs," whose only object was to capture their money; and that it was folly to pay money to irresponsible directory schemers. Held, that the article was libelous per se.—*ROBINSON V. EAU CLAIRE BOOK & STATIONERY CO.*, Wis., 85 N. W. Rep. 988.

65. **STATUTE OF FRAUDS**—Sale of Land — Memorandum.—The memorandum of a contract for the sale of land, to satisfy the statute of frauds, may consist wholly of letters, if they are connected by reference, expressed or implied, so as to show on the face that they all relate to the same subject matter. This relation cannot be shown by parol, but it must appear from the nature of the contents of the letters, or by express reference therein to each other. Such memorandum, whether it consists of a single writing or several, must express the substantial terms of the contract and its subject-matter with reasonable certainty. It is not, however, essential that the land be described with precision, if the writing on its face is an adequate guide to find it.—*SWALLOW V. STRONG*, Minn., 85 N. W. Rep. 942.

66. **STREET RAILROADS**—Right of Way.—A street car company operating cars upon public streets and other persons lawfully occupying such streets have rights alike, in the main. The cars cannot turn out, as can persons driving or walking, so that in this respect it may be said that the company has a paramount right over its tracks. Beyond that, the duties of the parties are reciprocal, and so are their rights. Except as before indicated, they are charged with the same measure of care and the same duties.—*ARMSTEAD V. MENDEHALL*, Minn., 85 N. W. Rep. 929.

67. **STREET RAILWAYS**—Negligence.—Where plaintiff was injured, while boarding a street car, by reason of the sudden starting of the car, an instruction that, to warrant a finding that the injury was caused by the want of ordinary care on the part of the conductor, the jury must find that the accident might reasonably have been expected as a result of his conduct, by such conductor, in the exercise of ordinary care as a "a man of intelligence, having the knowledge that may be reasonably expected and ought to have been had" in doing such work, was erroneous, since it permitted the jury to use as a standard their ideal of what a conductor ought to be, instead of what they usually are.—*DEHSOY V. MILWAUKEE ELECTRIC RY. & LIGHT CO.*, Wis., 85 N. W. Rep. 978.

68. **TAXATION**—Capital in Business.—Where in a suit to enforce an assessment of taxes on capital invested in a business the only evidence was that of defendant, who denied having any capital in the business, but spoke of collaterals being put up by him to obtain credit, the sum or amount of which was not given, a judgment for him was proper, since the evidence was too indefinite to be the basis of a verdict.—*BOARD OF SUPRS. OF WARREN COUNTY V. CRAIG*, Miss., 29 South. Rep. 821.

69. **TAX SALES**—Persons Barred.—A valid sale of land for taxes will deprive claimants to contingent remainders therein of any rights they may have had thereto, since the obligation devolves on all persons in any way interested to see that such taxes are paid.—*HAZLIP V. NUNNERY*, Miss., 29 South. Rep. 821.

70. **USURY**—Extension of Note.—If a debtor applies to his creditor for an extension of time in which to pay his debt, and, as a condition for the extension, the latter sells to the former property at an exorbitant price, which he knows he does not want, and makes such a sale a condition for the extension, the transaction cannot be considered a *bona fide* sale, and is nothing more or less than a usurious loan.—*KOMMER V. HARLINGTON*, Minn., 85 N. W. Rep. 939.

71. **WILLS**—Authenticated Copy.—Rev. St. 1898, § 2295, provides that when a will devising land in Wisconsin has been probated in any other State, and an authenticated copy has been recorded in the office of the register of deeds of any county in which such lands are situated, the will shall then have the same effect to pass title as if probated in Wisconsin, and that the record of such copy shall be presumptive evidence of the authority of any person authorized by will to convey such land; and section 3267 declares that, on the filing of an authenticated copy of the original appointment of a foreign executor in the county court, he may exercise any power over the estate, including the sale of the same, which an executor appointed by a court of Wisconsin can exercise. Plaintiff in an action to quiet title introduced a duly authenticated copy of a will probated in Pennsylvania, devising all of testator's realty, wherever situated, to his executrix, and authorizing her to sell the same and to execute a deed to the purchaser. Held, that the contention that the copy of the will and the deed executed by the executrix were not admissible, because section 2295 and section 3267 were dependent, and must be construed together, and that therefore it was necessary to file a copy of the appointment of the executrix in the county in which the land was situated, in order to entitle her to make a valid sale, could not be sustained, since the two acts are independent; section 2295 referring to wills in which the executor is authorized to make a conveyance, and section 3267 to cases in which the authority to sell must be obtained by judicial authority.—*MCINTOSH V. MARATHON LAND CO.*, Wis., 85 N. W. Rep. 976.

72. **WILLS**—Construction—Life Estate.—A bequest of an undivided third part of the residuum of an estate, consisting of money, to a daughter, "to have and to hold during the term of her natural life," is a bequest which entitles the legatee to the possession of the fund for and during her natural life, and not an absolute gift.—*HARRIS V. DAWLEY*, E. I., 49 Atl. Rep. 80.

73. **WILLS**—Residuary Devise.—Testator directed his executors to set aside a sufficient amount to provide an annual income of \$400 to be paid to N for his support during his natural life, and made other bequests amounting to \$66,000 to other persons and to certain benevolent and charitable associations, and provided that, if his estate should exceed the amounts required to pay all legacies, then there should be added to the amounts devised to the said individuals, institutions, and societies an amount *pro rata*, or in proportion to the amount given to each. The executors set aside \$10,000 to provide an income for N. Held, that the contention that testator died intestate as to the remainder of the \$10,000 could not be sustained, since the provisions of the will were sufficient to show an intention on the part of the deviser to make the \$10,000 a part of his residuary estate.—*WREED V. SCOFIELD*, Conn., 49 Atl. Rep. 22.

74. **WILLS**—Testator's Intention—Life Estate.—Where a will devised the residue of testator's estate to his wife, with power to sell and convey all or any part, or use the same in any manner she might see fit during her life, and at her death the balance, if any remained, to his lawful heirs, the wife took only a life estate, so that at her death intestate the portion of the estate which she had not disposed of did not go to her heirs, but to the heirs of the husband at the time of his death.—*ADAMS V. LILLIBRIDGE*, Conn., 49 Atl. Rep. 21.